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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,858

CIVIL

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, P. A. E. DILLMAN, HARRY J. HYDRO, AND HARRY HOSS, APPELLANTS,

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

FILED

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E. E. KOCH
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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,548

CIVIL.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL, APPELLANTS,

VS.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

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The record filed herein by Appellants omits material and relevant portions of the proceedings as shown by the docket entries in the office of the Clerk of the District Court in this cause and the Appellants' record also omits much material and relevant portions of the testimony in various and numerous hearings. For the convenience of the Court this Supplemental Record sets forth in chronological order the material and relevant pleadings and documents filed in the office of the Clerk of the District Court as well as abstracts of testimony given at various hearings. Where the documents or papers filed in the office of the Clerk have been reproduced in Appellants' record, reference thereto will be indicated by (R.....).

February 18, 1954

Filed Complaint (R. 15).

March 10, 1954

Filed notice of defendant Union Electric Power Co. to take depositions of all plaintiffs and others upon oral examination.*

March 15, 1954

Filed notice and proof of service of interrogatories and interrogatories propounded to plaintiffs by defendants other than Union Electric Power Company.**

(There were numerous interrogatories propounded and answered, of which interrogatories 1, 2(b), 3 and 4(c), and the answers thereto, which were filed April 14, 1954, are reproduced as follows, to-wit:)

Interrogatory 1. State whether plaintiff First Iowa Hydro Electric Cooperative claims that all of the damages alleged in paragraph 18 of the Complaint accrued to it in its capacity as a cooperative; and if said plaintiff claims that only a portion of said damages accrued to it and that the remaining portion

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*The docket entries have been abbreviated.

**Wherever defendants are referred to herein, it includes all defendants except the Wisconsin Power and Light Co., which company was never served and did not appear.

accrued to the other plaintiffs individually and not as members of said cooperative state the amount of said damages which said plaintiff claims as accruing to it.

Answer to Interrogatory 1. Yes.

Interrogatory 2(b). The amount in money, if any, which said plaintiff claims on account of loss of profits to the individual plaintiffs in their individual business.

Answer to Interrogatory 2(b). No claim for past loss to plaintiffs' individual personal businesses.

Interrogatory 3. Set forth a balance sheet showing, by description and by dollar amount, the amount and nature of the financing of plaintiff contemplated by paragraph 12 of the Complaint, and the assets, by description and dollar amount, which would be the basis of such financing. Itemize by year any changes in said statement from June 10, 1938 through the present date.

Answer to Interrogatory 3. $60,000,000 in 40 year 4% bonds planned, secured by Moscow Dam Project valued at $32,084,000, Rochester Dam Project valued at $18,008,000 and transmission system valued at $5,870,000. For further information see Charles T. Main, Inc., reports above mentioned.

Interrogatory 4(c). State, as to each change of membership in plaintiff, whether the new member paid any consideration for his membership, and if so, the amount of said payment, the date of said payment, and to whom it was paid.

Answer to Interrogatory 4(c). Each member, on joining, paid to the treasurer the sum of $2.00 as provided for in the articles of incorporation.

March 17, 1954

Filed notice and proof of service of motion by defendants other than Union Electric Power Company for the production of documents for inspection and copying.

March 30, 1954

(Abstract of proceedings before Riley, J., regarding defendants' notice of depositions and motion for production of documents, and plaintiffs' motion to vacate and quash notice of depositions and motion to enlarge time to answer and to object to interrogatories. All parties represented by attorneys of record. Excerpts of Court's statements in open court:

"The charges are very general in the complaint. To use a hunting term, I think counsel for the plaintiffs are hunting with a shotgun and they object because counsel for defendants want to use a rifle, and I think counsel for defendants are entitled to use a rifle, and they are entitled to find out against what the shotgun is being pointed. * * * * They have a very serious charge against them made in very general terms. Under the old rule we would be in here with a plethora of motions for more specific, more definite statements, and to strike, and everything else. Those we will waste little time on because the discovery proceedings are designed to permit the very thing that is being undertaken here. * * *" (Tr. 16-19)

"The complaint as I understand charges the defendants jointly and severally, but the allegations of the complaint are general and apply equally to all defendants. There are 11 defendants. I wouldn't want the plaintiffs to be harassed by 11 separate attempts to interrogate each one of the separate plaintiffs by the taking of depositions, and they shouldn't be subject either to the annoyance or the expense of anything of that kind, so that that is another matter in which it would seem to me it is desirable that all counsel sit down and try to figure out and agree upon how the matter will be handled and depositions taken in an orderly way.

"Now, I do believe that if these plaintiffs present themselves for depositions at the request in this instance of Mr. Walker's client, the Union Electric Power Company, with notice to all other defendants it ought to provide an opportunity for them to come in and separately without tying themselves into his defense at all eliciting the information they are seeking. Otherwise we would subject them to the hazard if eleven separate depositions at eleven separate

places necessitated the employment and presence of their counsel, and there are five plaintiffs other than the Co-operative, and each of them separately—that would be interminable." (Tr. 22-23)

April 3, 1954

Filed and entered order overruling plaintiffs' motion to vacate notice of taking depositions; and overruling plaintiffs' objections to an order for the production of documents; and that plaintiffs' motion to enlarge the time in which to answer interrogatories are sustained; plaintiffs given fifteen (15) days additional time to answer or object, Riley, J.

April 21, 1954

Filed stipulation. (The following stipulation was executed by all parties.)

It is stipulated by and between plaintiffs and defendants as follows:

1. Plaintiffs shall produce the documents as provided in defendants' motion for production at the United States District Attorney's Office in the Federal Court House, Davenport, Iowa, within five days after the pending interrogatories have been fully answered by plaintiff First Iowa Hydro Electric Cooperative pursuant to any order of the Court.

2. Depositions of Union Electric Power Company shall commence thirty days after the completion of the production of documents by plaintiffs.

3. The depositions requested by Union Electric Power Company shall commence in one of the court rooms of the Scott County, Iowa, District Court House, Davenport, Iowa, or at such other place as may be hereafter agreed upon by the parties, or as required by the Federal Rules of Civil Procedure. Such depositions shall commence at 1:30 P.M. on the thirtieth day following the completion of the production of documents by the plaintiffs, or the first judicial day thereafter.

4. Defendants shall enter an appearance at the depositions requested by Union Electric Power Company.

5. Defendants shall move or plead to the complaint within twenty-five (25) days after the completion of the depositions requested by Union Electric Power Company.

6. No depositions or other discovery procedure shall be initiated by any party, plaintiffs or defendants, until the depositions requested by Union Electric Power Company have been completed.

DATED: April 1, 1954.

April 30, 1954

Filed and entered order that certain defendants shall plead to complaint within twenty-five (25) days after completion of depositions requested by Union Electric; that stipulation filed April 21, 1954, is approved; and that proposed order on defendants' motion for production of documents filed March 17, 1954, is entered, subject to time and place of production as provided in stipulation, Riley, J.

May 19, 1954

Filed defendants' motion to strike answers to interrogatories as filed, and to require proper and complete answers thereto.

June 8, 1954

Filed resistance by plaintiffs to motion to strike answers to interrogatories and proof of service.

July 9, 1954

Filed memorandum and order relating to objections and answers to interrogatories, Riley, J. (Said order and excerpts from the memorandum are set out below.)

Generally, the use of discovery methods follows the closing of the pleadings, when the issues have become clear. In this case different defendants gave notice before answer of proceedings under Rules 26, 33 and 34 and elicited motions by plaintiffs to vacate the notices and to enlarge the time period.

It appeared at the time of hearing on the motions at Davenport (inserted during our regular term there) and from the necessarily cursory examination then permitted, that the request of defendants to be allowed discovery before answer, though unusual, was not unreasonable because of the grave nature of the plaintiffs' claim. Accordingly, plaintiff's request for time to answer interrogatories and make objection was granted by a liberal allowance.

* * * * * * * * * * *

An examination of the interrogatories and of the scope and detail thereof, of plaintiff's answers and objections to those unanswered, and of defendants' motion to strike answers filed and to require other answers more responsive, suggest and confirm that the court's prior order, permitting the parties so to proceed before answer, was ill-advised.

* * * * * * * * * * *

It is true these same interrogatories by the defendants were on file when the order of April 3, 1954, was made and when counsel stipulated following the court's request, but the answers and conflicting objections and motions confirm the court's belief that to proceed to rule on the questions thus presented, with a likely consequence of more alleged unresponsive answers and resulting objections and motions, may serve not only to defeat the purpose of Rule 33 but also of the Rules themselves, which are designed to secure the just, speedy and inexpensive determination of the action.

* * * * * * * * * * *

The court has examined all of the pleadings relating to the interrogatories and the briefs and answering briefs of counsel, and is aware of the industry of counsel which they reveal. However, the court is persuaded that the use and application of Rule 33 may be more effective in this case if we seek not just to follow the precedents cited, though they are numerous and respected, but rather to effectuate the purpose declared at the hearing on March 30, 1954, at Davenport. That will require a measure of cooperation among all counsel which so far is not conspicuously manifested. An example is provided by reference to defendants' interrogatory No. 14, (a) to (j) inclusive, and the nine interrogatories following, and to plain-

tiff's answers and objections, and to defendants' motions and objections to the answers made.

I am now convinced that it will enable the court better to serve the ends of justice to revoke all of the previous orders, commencing with that of April 3, 1954, concerning these discovery proceedings and the filing of an answer, to disapprove the stipulation of April 21, 1954, by counsel, and to direct the defendants and each of them to plead to plaintiffs' complaint, and as soon as the pleadings are closed and the issues joined, to proceed with the production of documents and to the taking of depositions under Rule 26, now postponed by order of court. If a time and place cannot be agreed upon by stipulation, the court will fix the same by order.

* * * * * * * * * * *

Order

Upon consideration of the motions filed herein on behalf of both plaintiffs and defendants with respect to interrogatories proposed herein by the parties prior to any answer or the cause being at issue, the court finds pursuant to its memorandum hereinabove, and,

It Is Ordered that: a) plaintiff's objections to defendants' interrogatories be and the same are hereby sustained; b) defendants' objections to plaintiff's purported oath and signatures are sustained, and plaintiff is allowed ten (10) days from the filing of this order to make and file a written oath to the effect that Harry J. Strong or H. J. Strong (as he may sign) is secretary-treasurer of plaintiff First Iowa Hydro Electric Cooperative, that the answers to interrogatories filed herein on April 14, 1954, to which his signature is attached, were made by him in his capacity as such officer for and on behalf of plaintiff, and that in making such answers he consulted and relied upon his own knowledge, upon the files and records of the plaintiff and upon information provided by officers and directors of plaintiff, and that said answers are true and correct; failing this, plaintiff will be subject to sanctions to be imposed under Rule 37; and c) defendants' objections to plaintiff's answers and their motions to strike the answers, be and the same are hereby overruled. These rulings are without prejudice to defendants' right to seek to develop or obtain by deposition the information sought by the interrogatories.

It Is Further Ordered that the previous orders, commencing with that of April 3, 1954, concerning discovery proceedings herein and times to plead, be and they are hereby vacated; that the stipulation of counsel of April 21, 1954, as to discovery and time to plead, be and the same is disapproved and defendants and each of them are directed within twenty (20) days from the entry of this order to plead to plaintiffs' complaint.

July 28, 1954

Filed answer of defendant Iowa Electric Light and Power Company and Northwestern Light and Power Company. (By July 29, 1954, all defendants had answered. While differing in some particulars the answers of all defendants were substantially the same as that of Iowa Electric Light and Power Company and Northwestern Light and Power Company which is set out below.)

Comes now the defendant Iowa Electric Light and Power Company (designated in the complaint as Iowa Electric Light & Power Co.) and the defendant Northwestern Light and Power Company (designated in the complaint as Northwest Light and Power Co.) and for answer to the complaint herein states as follows:

FIRST DEFENSE

The complaint fails to state a claim against these defendants of which this court has jurisdiction, and said complaint wholly fails to state facts showing that the claim of the plaintiffs is one of which this court has jurisdiction under the Sherman or Clayton Anti-Trust Acts.

SECOND DEFENSE

The complaint fails to state a claim against these defendants or either of them upon which relief can be granted.

THIRD DEFENSE

The complaint fails to state a claim or cause of action against these defendants or either of them in that:

1. Said complaint wholly fails to allege that the plaintiff corporation or the individual plaintiffs had an intent and preparedness to engage in the business referred to in the complaint, or that plaintiff corporation or the individual plaintiffs could have engaged in business as alleged in the complaint, independent of any act or conduct of these defendants, in that among other things:

(a) Said complaint wholly fails to allege that the plaintiff corporation or any of the individual plaintiffs have complied with the laws of the State of Iowa applicable to said proposed project and the financing thereof, the compliance therewith being a necessary requirement and a condition precedent to the plaintiffs engaging in business or in the building, constructing or financing of the proposed project referred to in plaintiffs' complaint, and that among the laws of the State of Iowa as to which plaintiffs fail to show compliance as a prerequisite and condition precedent to the construction of said project referred to in plaintiffs' complaint and the financing thereof, if said project be deemed a business, are chapters of the 1954 Code of Iowa as follows: Chapter 402; Chapter 499; Chapter 469A; Chapter 469, and Chapter 489.

(b) The complaint wholly fails to allege that plaintiffs ever had been authorized or are now authorized to do business in the States of Wisconsin, Illinois or Missouri, and said complaint also wholly fails to allege that the plaintiffs have complied, as conditions precedent, with the laws of said states with reference to the procurement of necessary franchises and permits and authority for the construction or maintenance of transmission lines or the distribution of electric power and light in the States of Wisconsin, Illinois and Missouri, and said complaint wholly fails to allege facts showing preparedness to engage in interstate commerce.

(c) The complaint wholly fails to allege that the plaintiffs have complied with the conditions annexed to and forming a part of the Federal license of the Federal Power Commission, being License No. 1853, and with other applicable provisions of the Federal Power Act, Title 16, U.S.C.A., Section 791, et seq., and the regulations issued thereunder.

2. None of the plaintiffs is a "person * * * injured in his business or property by reason of anything forbidden in

the antitrust laws" within the meaning of Section 4 of the Clayton Act, Title 15, U.S.C.A., Section 15, and this action will not lie in that:

(a) The complaint fails to allege that plaintiffs had any business or property subject to damage.

(b) It appears from the complaint that plaintiff corporation is a co-operative association allegedly organized and existing under and pursuant to the provisions of Chapter 499, Code of Iowa 1954 (Chapter 390 G (1) of the 1935 Code of Iowa), and that said complaint wholly fails to allege facts which would warrant recovery of any damage resulting from any of the acts charged against these defendants which could or would be the property of plaintiff corporation or the individual plaintiffs.

(c) Such damages, if any, that may have resulted from any of the acts charged against these defendants are not the property of either the plaintiff corporation or the individual plaintiffs, but under the provisions of Chapter 499, Code of Iowa 1954, would only result or inure to the benefit of users and consumers of the products or services of said corporation.

(d) Plaintiff corporation is a co-operative association allegedly organized and existing under and pursuant to the provisions of Chapter 499, Code of Iowa 1954, but has never engaged in business as a co-operative and has no members within the limitations of Section 499.13, which provides, in part, as follows:

> "Individuals may be eligible (to membership) only if they are engaged in producing products marketed by the association, or if they customarily consume and use the supplies or commodities it handles, or use the services it renders."

(e) The plaintiffs lack the capacity to sue and have neither the authority to maintain this action nor the right to recover in that the corporate plaintiff, as a co-operative association organized under and subject to the laws of the State of Iowa, cannot recover damages, profits or earnings for its own benefit, and the individual plaintiffs, having no business or property which has been injured, and admittedly seeking

no damages, cannot sue for themselves or for the benefit of unknown and prospective members of the corporate plaintiff and any unknown and prospective users and consumers of the products or services of the corporate plaintiff.

(f) The individual plaintiffs are not entitled to maintain this action either on behalf of themselves individually or as a derivative action on behalf of the plaintiff corporation, and the complaint wholly fails to allege conditions precedent to the maintenance of a derivative suit on behalf of the corporation and wholly fails to assert any claim or right to relief on behalf of the individual plaintiffs.

FOURTH DEFENSE

These defendants state that plaintiff corporation exists as a corporation solely and alone by reason of the laws of the sovereign State of Iowa under and pursuant to the provisions of Chapter 499, Code of Iowa 1954, and that said corporation, existing and created under and pursuant to the laws of the State of Iowa, is limited in its rights and powers by all other laws of the State of Iowa and plaintiff corporation has no power or authority to engage in any business or activity without complying with Iowa law and has no power to engage in any business activity which would be contrary and in violation of Iowa law, and the mere fact, if it be a fact, that the Federal Power Commission has granted to the plaintiff corporation a permit to engage in the activity therein provided does not thereby vest plaintiff corporation with any power which it would not otherwise have under Iowa law, and plaintiff corporation accordingly has no corporate power or authority to do or engage in any of the types of activity as to which permits from the State of Iowa are required pursuant to Iowa law, including those provisions of Iowa law referred to in the Third Defense herein which are incorporated herein by reference, and to the extent, if any, that the Federal Power Act, Title 16, U.S.C.A., Section 791, et seq., by its provisions or as construed and applied, purports to invest and confer upon plaintiff corporation power or authority beyond the corporate power or authority authorized by the State of Iowa, the said Federal Power Act is in violation of the Constitution of the United States and particularly the Tenth Amendment thereof.

FIFTH DEFENSE

By way of further answer to said complaint these defendants state:

1. With regard to any alleged cause of action by plaintiffs against these defendants under the Sherman or Clayton Anti-Trust Acts, recovery of damages or other relief is limited to the period prescribed by the applicable statute of limitations of the State of Iowa, to-wit, two years prior to the filing of said complaint under Section 614.1(3), Code of Iowa 1954, and all causes of action for which plaintiffs seek relief in said complaint accruing prior to that time, and all damages sustained by plaintiffs prior to that time, for which recovery is sought in the complaint, are barred.

2. In the alternative to paragraph 1 of this defense, recovery of such damages or other relief is limited to the period of five years prior to the filing of said complaint under Section 614.1(5), Code of Iowa, 1954, and all causes of action for which plaintiffs seek relief in said complaint accruing prior to that time, and all damages sustained by plaintiffs prior to that time, for which recovery is sought in the complaint, are barred.

SIXTH DEFENSE

The five (5) individual plaintiffs under the guise of an alleged co-operative association are seeking their personal and individual enrichment, and to permit said individual plaintiffs to recover damages in the sum of One Hundred Twenty Million Dollars ($120,000,000) or in any amount, would constitute an unjust enrichment of said individual plaintiffs. The plaintiff corporation, being organized and existing under and by virtue of Chapter 499, Code of Iowa 1954 (Chapter 390G (1) of the 1935 Code of Iowa) is not and has never become such a co-operative corporation to be entitled to bring or maintain this action. To permit either plaintiff corporation or its five (5) individual plaintiff members thereof to recover from these defendants or either of them damages in the sum of One Hundred Twenty Million Dollars ($120,000,000) or in any amount would be an unjust enrichment and contrary to the laws and public policy of the State of Iowa authorizing the creation of such corporations for limited co-operative purposes. To permit recovery herein would be contrary to and beyond the

contemplation of the Sherman Act and the Clayton Act and the public policy of the State of Iowa and of the United States.

SEVENTH DEFENSE

By way of further answer to said complaint these defendants state:

1. Plaintiffs are barred by reason of laches from maintaining this action.

EIGHTH DEFENSE

For further answer to plaintiffs' complaint, these defendants state:

1. Answering paragraph 1 these defendants admit that this court has jurisdiction of actions brought under the Sherman or Clayton Anti-Trust Acts, and that the jurisdiction of this court is invoked under those Acts. However, these defendants deny that this controversy in fact involves any violation of said Acts, or that the complaint sets forth a violation of said Acts as to these defendants, or that these defendants have violated said Acts, and this court has no jurisdiction of the alleged controversy between plaintiffs and these defendants.

2. Answering paragraphs 2, 8, 9 and 12, these defendants state that they or neither of them have sufficient information to form a belief as to the truth of the allegations in said paragraphs, and, therefore, deny the same and demand strict proof thereof.

3. Answering paragraph 3, these defendants admit that on or about September 8, 1948, the Federal Power Commission issued Project License No. 1853 to plaintiff corporation, but as to how long or whether or not the same is in full force and effect these defendants do not have sufficient information to form a belief and therefore deny the same and demand strict proof thereof. These defendants deny each and every other allegation of said paragraph contained, and specifically deny that plaintiff corporation was ever permitted or authorized to construct the project. These defendants deny that plaintiffs had an intent and preparedness to engage in business and plaintiffs have wholly failed to comply with and to have the

requisite authority to proceed with said alleged project under the laws of the State of Iowa, including Chapter 502, Code of Iowa 1954; Chapter 499, Code of Iowa 1954; Chapter 469A, Code of Iowa 1954; Chapter 469, Code of Iowa 1954; and Chapter 489, Code of Iowa 1954. Plaintiffs have also wholly failed to comply with and to have the requisite authority to proceed under the requisite statutes of the States of Wisconsin, Illinois and Missouri, with reference to qualifying as a foreign corporation to do business in said states or to comply with the laws of said states governing the sale or distribution of electricity and the construction and operation of transmission lines and related activities, and plaintiffs have failed to comply with and to have the requisite authority to proceed under the statutes of the United States, including Title 16, U.S.C.A., Section 791, et seq., and particularly Sections 802(a) and 806 thereof. These defendants further deny that plaintiff corporation had any corporate power or authority to engage in or undertake the construction of said project without complying with Iowa law.

4. Answering paragraph 4, defendant Iowa Electric Light and Power Company admits that it is an Iowa corporation and that its principal place of business is in Cedar Rapids, Iowa, and defendant Northwestern Light and Power Company admits that it is a Delaware Corporation with a principal place of business in Cedar Rapids, Iowa. These defendants further admit that the defendant Iowa Utilities Association is an unincorporated voluntary association of which these defendants are members. These defendants deny each and every other allegation of paragraph 4 not hereinbefore admitted or otherwise pled to, and these defendants further state that there are other members of said Iowa Utilities Association who are not parties to this suit. Further answering these defendants state that as a matter of law this action is not properly brought against said Association by reason of the fact that the relief sought is actually sought against the corporate defendants, parties hereto, and that said Association is not a proper party defendant.

5. Answering paragraph 5, the defendant Iowa Electric Light and Power Company admits that it sells and distributes electric light and power in the State of Iowa. Defendant Northwestern Light and Power Company admits that at and

prior to the commencement of this suit it sold and distributed electric light and power in Iowa but that at the time of the filing of this answer it is no longer so doing. These defendants admit that they are members of the Iowa Utilities Association and that the office of said association is in Des Moines, Iowa. Further answering, these defendants deny each and all of the other allegations in paragraph 5 not hereinbefore admitted and these defendants further state that said association is merely a trade association for the purpose of education and dissemination and exchange of information as to the utility business, and that it has no control or power over these defendants or any of its members.

6. Answering paragraph 6, these defendants deny that they are liable, either jointly or severally, to plaintiffs in this cause or that plaintiffs are entitled to any relief against them or either of them, either severally or jointly with other defendants.

7. Answering paragraph 7, defendant Iowa Electric Light and Power Company admits that it sells and distributes electric light and power in the State of Iowa only, and defendant Northwestern Light and Power Company admits that it sold and distributed electric light and power within the State of Iowa at and prior to the time of commencement of this suit, but at the time of filing this answer it is no longer engaged in the selling or distributing of electric light and power. Iowa Electric Light and Power Company further states that it has never sold nor distributed electric light and power other than in the State of Iowa, and Northwestern Light and Power Company alleges that for a short period of time it had a few miles of electric transmission lines in the State of Minnesota, but that it has not sold nor distributed electric light and power other than in the State of Iowa since on or about the year 1935. These defendants further state that neither of them now or at any time have ever controlled the business of any other defendant herein, and that no other defendant herein has ever controlled the business of these defendants, and these defendants deny each and every other allegation of said paragraph 7.

8. These defendants deny the allegations of paragraphs 10, 13, 14, 15, 16, 17 and 18. Further answering, these defendants specifically deny that any act of either of these defendants was the proximate cause of the damages, if any, allegedly

sustained by plaintiffs, and plaintiffs, therefore, were not injured in their business or property, if any they had, by reason of anything forbidden or declared to be unlawful by the anti-trust laws. These defendants further specifically deny that said project of plaintiffs was feasible, doable and economically sound, and state that the failure of the plaintiffs to finance said project was not occasioned or brought about by any act or conduct of these defendants. These defendants further state that the project, as proposed by plaintiffs, was opposed by the sovereign State of Iowa and by numerous other parties, not parties to this suit nor alleged by plaintiffs to be parties to any conspiracy.

9. Answering paragraph 11, these defendants admit that the period of time covered by said complaint purports to begin in the year 1938, but state that they have no knowledge or information sufficient to form a belief as to when the other matters alleged in said complaint are claimed by plaintiffs to have occurred, and, therefore, deny that the said period of time covered by said complaint continued through the years up to and including the date on which said complaint was filed, and these defendants further state that causes of action accrued and damages sustained by plaintiffs, if any, more than two (2) years prior to the filing of said complaint, or in the alternative more than five (5) years prior to such filing are barred by Section 614.1(3) or by Section 614.1(5), Code of Iowa 1954, or by laches, as alleged in the Fifth and Seventh Defenses of this answer.

10. These defendants deny each and every allegation of the complaint not hereinbefore expressly admitted.

WHEREFORE, having fully answered the complaint herein these defendants pray that judgment issue for these defendants against the plaintiffs, together with their costs.

March 4, 1955

Filed application of answering defendants for an order relating to production of documents and records for inspection and copying, together with notice of application and certificate of service.

March 8, 1955

Filed order for the production of documents and records for inspection and copying by defendants, Riley, J.

April 13, 1955

Filed motion of defendant Union Electric Power Company for time, place and circumstances of taking depositions with proof of service. (Said motion is set out below:)

Comes now Union Electric Power Company, one of the defendants in the above entitled matter, and moves the court to order a time, place and circumstances for taking of the depositions of Harry J. Strong, F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber, J. W. DuBois, Ray Norris and J. M. Roth, which said parties were heretofore notified of the desire of this defendant to take depositions in accordance with Rule 26(a), and in support of said motion, this defendant states:

(1) In accordance with the understanding with counsel in connection with the taking of said depositions, attorneys for this defendant have made serious and continued efforts to enter into a stipulation with plaintiffs' counsel as to the time, place and circumstances for the taking of said depositions, which was in accordance with the desire of this court as expressed in previous orders.

(2) This defendant further states that plaintiffs' counsel has requested this defendant to proceed with its plans for depositions.

(3) This defendant states that because of difficulties encountered in connection with details of the taking of the depositions, it has made serious effort to arrive at a stipulation with plaintiffs' counsel concerning such details, and has in that connection contacted plaintiffs' counsel in an effort to arrive at a stipulation, but that notwithstanding such contacts, which have been made by letter and by telephone, plaintiffs' counsel has not answered this defendant's inquiries.

(4) This defendant further states that the difficulties that have now arisen in connection with the taking of the deposition are as follows:

(a) Since the Scott County Courthouse is being demolished and the State Courts in Scott County are using the Federal Building, it is not possible for the depositions to be taken in either one of those two locations and another place for the taking of the depositions must be found. In that connection, this defendant has obtained available space in the Davenport Bank Building which will be satisfactory for the purpose.

(b) A date must be set upon which the depositions are to commence and the manner in which they shall progress must be decided.

(c) The hours of the day and the days of the week during which the depositions shall continue must be decided. In that connection, since the depositions will take a considerable period of time, and the defendants wish to obtain daily transcripts of the evidence taken, defendant has suggested that the hours of the taking of the deposition be from 9 o'clock a.m. without interruption except for rest periods until 1 o'clock p.m., and that the days of the week will be Mondays through Fridays.

(d) The matter of the officers before whom the depositions are to be taken must be settled. In that connection, this defendant has ascertained that the Scott County Reporters do not have sufficient staff to take the depositions in question and produce daily copy. For that reason, this defendant has considered the employment of the reporting firm of Eulass & Company of Chicago. Under Rule 28(a) the court may appoint one of the members of this reporting firm or some other party as the officer before whom the deposition should be taken. The defendant is desirous of using the services of the local court reporters as far as possible and Mr. David J. Hess of Davenport would be available to act as an officer for the taking of depositions, provided it was not necessary for him to comply with Rule 30(c) by being present during the recording of all of the testimony of the witnesses. If it is the judgment of the court that Rule 30(c) with respect to the presence of the officer is essential, then the court could appoint Mr. Michael T. Organ, sole owner of the Eulass & Company reporting company of Chicago to act as the officer in accordance with Rule 28(a).

(e) A dispute has arisen as to whether or not plaintiffs will be required to produce all of the documents at the deposition that were previously produced in the office of the Clerk

of this court in accordance with the prior order of this court and the prior stipulations of counsel. In this connection, defendant has endeavored to agree with the plaintiff that photostatic copies of the original documents may be marked in evidence as to identification at the taking of the deposition in preference to the production of the original documents themselves, but plaintiffs have indicated that the original documents will not be produced without a subpoena and that they would not be agreeable to the introduction of photostatic copies. Defendant had suggested photostatic copies for the convenience of the plaintiff in that the defendant would have no objection to the introduction of the originals.

* * * * * * * * * * *

WHEREFORE, defendant Union Electric Power Company moves the court to enter an order providing for the following matters:

(1) The time as to day and date that these depositions shall start.

(2) The place where the depositions shall be taken.

(3) The hours of the day during which the deposition shall be taken.

(4) The days in the week during which the deposition shall be taken.

(5) The officer before whom the deposition shall be taken.

(6) The documents that will be produced by the plaintiffs.

(7) The issuance of subpoenaes by the Clerk of this court to the witnesses requiring their attendance at the deposition.

(8) An order to the Clerk of this court directing him to issue a subpoena duces tecum to all of the plaintiffs herein for the production of all documents in their possession pertaining to this cause of action, and specifically, but not limiting the general, all documents heretofore produced by the said plaintiffs.

(9) The identification and introduction of the original documents as evidence at the taking of the depositions unless the plaintiffs stipulate with regard to the introduction of photostatic copies.

(10) That the deposition of the plaintiff Harry J. Strong shall be taken first and that upon the conclusion of the taking of the said Strong deposition, the time, place and circumstances of the taking of the depositions of the other witnesses shall be set by the further order of this court, upon the application of this defendant.

April 29, 1955

Filed motion of plaintiffs to require payment of expenses, praying as follows:

> "Wherefore, plaintiffs respectfully move the court that the defendant Union Electric Power Co., be not allowed to take the depositions of Harry J. Strong, F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber, Ray Norris and J. M. Roth, on oral examination at Davenport, Iowa, pursuant to the notice heretofore served by said Defendant Union Electric Power Co. unless said defendant advances to plaintiffs, or pays into the office of the clerk of this court the expense of attendance of two of plaintiffs' attorneys at such examination, including reasonable counsel fees, and that said defendant likewise pay additional sums for such expenses if it hereafter appears that said depositions may continue longer than now anticipated, or in the alternative that such depositions be taken only on written interrogatories."

May 10, 1955

Filed motion of defendant Interstate Power Company for order re depositions. (Said motion is set forth below.)

Comes now defendant, Interstate Power Company, (sometimes hereinafter called "Interstate"), by its attorneys, and moves the Court that the "Motion of Defendant Union Electric Power Company for Time, Place and Circumstances of Taking Depositions" be granted, adopts said motion and incorporates it by reference herein as also the motion of Interstate Power Company, and further moves that this Court order that at said depositions this defendant shall have the right to appear and cross-examine the witnesses called by defendant Union Electric Power Company.

In support of said motion defendant states as follows:

1. On February 13, 1954, plaintiffs filed this lawsuit, seeking a decree and a joint and several judgment against eleven defendants, including Interstate Power Company, in the amount of $120,000,000.00. This relief was sought on the basis of a vague and generalized complaint, which complaint has been characterized by this Court as follows:

> "Here is a very serious suit. As I understand it the complaint seeks $40,000,000 and treble damages. The charges are very general in the complaint. To use a hunting term, I think counsel for the plaintiffs are hunting with a shotgun . . . and I think counsel for defendants . . . are entitled to find out against what the shotgun is being pointed." (Official transcript, March 30, 1954, p. 15.)

2. From the date of service of summons upon it, defendant Interstate Power Company has sought adequate discovery from plaintiffs of whatever facts, if any, might support these vague charges, for two reasons: (a) to enable this defendant to prepare adequately for trial, and (b) to make it possible to prepare an adequate motion for summary judgment, and thus enable this defendant to avoid the expenses of a trial lasting several months. Reference to answer of plaintiff cooperative to interrogatory 17, filed April 14, 1954, shows that the only individual act of this defendant on which plaintiffs have thus far claimed to rely is a conversation alleged to have occurred in one telephone call made on behalf of plaintiffs to this defendant in February 1950. Interstate is therefore desirous of ascertaining all facts which have caused plaintiffs to file such a claim against it.

3. To achieve such adequate discovery, this defendant took the following steps:

(a) On March 12, 1954, together with a number of other defendants it propounded interrogatories to plaintiff cooperative, which interrogatories were filed March 15, 1954.

(b) On March 17, 1954, together with a number of other defendants, it filed a motion for the production of certain documents and records deemed relevant.

(c) On March 18, 1954, defendant Union Electric Power Company served the notice to take the depositions which are the subject of this motion. Under date of April 1, 1954, this defendant and others stipulated that they would enter their appearances at said depositions, and they have subsequently participated in proceedings to arrange and schedule said depositions, pursuant to the following expressed wishes of the Court:

> "Now, I do believe that if these plaintiffs present themselves for depositions at the request in this instance of Mr. Walker's client, the Union Electric Power Company, with notice to all other defendants it ought to provide an opportunity for them to come in and separately and without tying themselves into his defense at all eliciting the information they are seeking. Otherwise we would subject them to the hazard of eleven separate depositions at eleven separate places . . . ." (Official transcript, March 30, 1954, p. 23)

4. On April 14, 1954, plaintiff filed objections to a number of said interrogatories. Interstate and other defendants, deeming the majority of said answers evasive and unresponsive, filed a motion to strike said answers on May 19, 1954.

5. This Court, on July 9, 1954, sustained plaintiffs' objections to interrogatories and denied defendants' motion to strike the answers to certain interrogatories. This ruling was not on the merits of the respective interrogatories or answers, the Court stating instead that there existed "a situation which deprives the court in the present state of the record of the opportunity to do justly as between the parties by ruling on all the related objections and motions." (Opinion, July 9, 1954, p. 2.) The Court's ruling was instead based upon two procedural grounds, at least one of which is relevant to this motion:

(a) That said interrogatories were merely premature and that it was not necessary that the information which they requested be obtained prior to the filing of answers to the complaint. "The interrogatories, answers, objections and counter-objections go far beyond the objective of permitting the defendants to obtain information appropriate to answer." Opinion, July 9, 1954, pp. 1-2.)

(b) That the Court believed that the same information could be obtained in a less involved manner by the production

of documents and by the depositions which are the subject of this motion. The Court therefore directed the defendants, and each of them, "to proceed with the production of documents and to the taking of depositions under Rule 26, now postponed by order of court. If a time and place cannot be agreed upon by stipulation, the court will fix the same by order." (Opinion, July 9, 1954, p. 3.)

". . . . These rulings are without prejudice to defendants' right to seek to develop or obtain by deposition the information sought by the interrogatories. (Order, July 9, 1954, p. 4.)

6. Pursuant to the direction of the Court set forth in paragraph 5 above, certain defense counsel acting on behalf of all counsel for the defendants met with plaintiffs' attorneys on September 8, 1954 in Des Moines to discuss the production of documents by plaintiffs. Plaintiffs' attorneys agreed to produce the documents called for by the motion for production as soon as their then existing commitments would permit them to do so, which they stated they believed would not be later than September 27, 1954. This understanding was confirmed by letter to counsel for plaintiffs on September 10, 1954, and not contradicted by said counsel.

7. On December 9, 1954, no documents having yet been produced by plaintiffs, counsel for a defendant wrote counsel for plaintiffs requesting information as to the arrangements they had in mind for production.

8. Production of documents for inspection and copying at the office of the Deputy Clerk in Davenport was not commenced by plaintiffs until January 18, 1955. Subsequent to said date plaintiffs refused to produce all of the records called for by said motion for production. As a result of said refusal, on March 2, 1955, all answering defendants served upon counsel for plaintiffs an "Application of Answering Defendants for an Order Relating to Production of Documents and Records for Inspection and Copying," which application set forth the foregoing and other facts, together with notice that said application would be presented to the Court for hearing on March 8, 1955.

9. On March 8, 1955 this Court entered an order granting said application; and on said date plaintiff Harry J. Strong

orally agreed to produce the balance of said records by March 14, 1955. Additional records were in fact produced by him on said date.

10. At a preliminary pretrial conference on March 8, 1955, attended by counsel for plaintiff and defendants, Robert H. Walker, counsel for Union Electric Power Company, stated that Mr. McManus, of counsel for plaintiff, had requested that the scheduled depositions be deferred for approximately six weeks, until about April 25, 1955; that it was his understanding that the Court desired all defendants to participate in said depositions in lieu of convening separate depositions of the same witnesses; that counsel for defendants did not object to so setting the matter over; and that counsel for plaintiff was willing to produce said witnesses at about said time. Counsel for plaintiffs did not contest this statement.

11. Oral and written attempts by Mr. Walker to obtain a firm commitment from plaintiffs as to time and place of taking said depositions were crystallized in letters to counsel for plaintiffs on March 9, 1955 and March 25, 1955. Upon the failure of plaintiffs to cooperate in any way, there was filed on April 12, 1955 the "Motion of Defendant Union Electric Power Company for Time, Place and Circumstances of Taking Depositions," which motion and the affidavit attached thereto state the facts as to said failure of plaintiffs to cooperate.

12. Under date of April 25, 1955, plaintiffs served upon counsel for defendant Union Electric Power Company, but not upon the other defendants, a pleading denominated "Motion of Plaintiffs to Require Payment of Expenses," which seeks to suppress said depositions of the plaintiffs and in lieu thereof to substitute such written interrogatories as "defendant Union Electric Power Company may properly propound to said witnesses," unless the attorneys' fees and expenses of plaintiffs' counsel are paid in advance.

13. Such an effort to deny all discovery to Interstate and other defendants, and to deny discovery by oral deposition to Union Electric Power Company, should be denied for the following reasons:

(a) For one year, commencing with the stipulation of April 1, 1954, and continuing through all subsequent oral and writ-

ten communications, plaintiffs have allowed all defendants to believe that they would voluntarily appear for their depositions.

(b) Having filed a vague complaint containing serious charges, and having been permitted to avoid answering interrogatories relating to those charges on the ground that plaintiffs' depositions could more readily furnish said information, plaintiffs should not now attempt to lower an "iron curtain" against the method designated by the Court for the furnishing of this information.

(c) The fact that said depositions may proceed is now the law of the case, as embodied in the opinion and order of this Court dated July 9, 1954, and is binding upon plaintiffs.

(d) Under Rules 26 and 30 of the Federal Rules of Civil Procedure, defendants are entitled to the oral depositions of these party plaintiffs. They cannot make these serious charges and then wrap themselves in an iron curtain.

(e) The forum in which plaintiffs filed this cause was the Davenport division of the U. S. District Court for the Southern District of Iowa; and the first proposed witness is plaintiff Harry J. Strong, a resident of Davenport. To seek travel expenses and attorneys' fees for attendance in Davenport is therefore contrary to the letter and spirit of Rules 26 and 30 of the Federal Rules of Civil Procedure.

(f) The complaint filed herein asks a judgment for treble damages and reasonable attorneys' fees, as provided in the antitrust laws. Not content with this remedy for compensation of attorneys provided by the antitrust laws, plaintiffs are seeking a part of this judgment in advance of any showing of merit to their claim.

(g) Although plaintiffs have been present on at least two occasions when the Court stated that it was advisable that all defendants follow Union Electric Power Company in taking said depositions instead of scheduling separate depositions of the same witnesses and although plaintiffs insisted that in the stipulation of April 1, 1954, all answering defendants agree to enter their appearances at said depositions, the instant motion of plaintiffs seeks to bar all rights of discovery of defendants other than Union Electric Power Company.

WHEREFORE, this defendant joins in requesting the relief prayed for in the Motion of Defendant Union Electric Power Company for Time, Place and Circumstances of Taking Depositions, and prays that the order of this Court recite that at said depositions defendant Interstate Power Company shall have the right to appear and cross-examine the witnesses called by defendant Union Electric Power Company.

May 16, 1955

Filed order re depositions of Harry J. Strong, Riley, J. (Said order is set out below.)

Now on this 16th day of May, A. D., 1955, the above matter coming on to be heard upon the motion of the defendant, Union Electric Power Company, and the related motions of Interstate Power Company and the Iowa Utilities Association for a time, place and circumstances for the taking of depositions, and the plaintiffs appearing by J. R. McManus, Allen R. Shepard, Xavier C. Nady and James C. France, and the defendant, Union Electric Power Company, appearing by Robert H. Walker, one of its attorneys, and Interstate Power Company appearing by Robert Bergstrom, one of its attorneys, and Iowa Utilities Association appearing by Sherwin J. Markman, one of its attorneys, and Iowa Power and Light Company appearing by Howard Steele, one of its attorneys, and Iowa Southern Utilities Company appearing by Maxwell O'Brien, one of its attorneys, and upon good cause being shown, and it appearing to the Court that the matters recited in said motion are important to the orderly disposition of the discovery procedure in this action, it is Ordered as follows:

(1) The defendant, Union Electric Power Company, will proceed to take the deposition of Harry J. Strong, one of the plaintiffs in this action, commencing at 9:00 a.m. on the 6th day of June, 1955.

(2) The place of the taking of the deposition of Strong is by the Court ordered to be in the Davenport Bank Building in the City of Davenport, Scott County, Iowa, or at the Grand Jury room in the Federal Building in Davenport, Iowa, or at such other place as may be mutually agreeable. The rental expense thereof shall be borne by the defendants.

(3) During the taking of the deposition of the said Strong, defendant, Union Electric Power Company, shall conduct such deposition from the hour of 9:00 a.m. to 12:00 noon and from 2:00 p.m. to 5:00 p.m. in the afternoons each day until the deposition is completed, Saturdays and Sundays excepted.

(4) Mr. Michael T. Organ, or in his absence Earl W. Radford, both of Chicago, Illinois, is hereby appointed by the Court as commissioner to take the deposition at the time and place as herein provided, all in accordance with Rules 28 and 30 of the Federal Rules of Civil Procedure and is for that purpose commissioned to swear the witnesses, proceed with the taking of the depositions and sign the certificate upon completion of the taking of said deposition.

(5) All of the documents heretofore filed by the plaintiffs herein, whether by stipulation, by order of the Court or by voluntary submission, shall be produced by these plaintiffs at the time of the taking of the said deposition.

(6) The plaintiff, Harry J. Strong, is directed to appear and present himself for examination by the defendant, Union Electric Power Company and other defendants, in accordance with the procedure prescribed in the Rules on the days and date heretofore provided for the beginning of the taking of said deposition and thereafter in accordance with the time and times, day and dates prescribed by this order for the taking of said deposition and to continue to subject himself to the jurisdiction of this Court and the examination as a witness at the deposition until the same has been concluded.

(7) The parties hereto shall proceed with dispatch in the taking of the deposition first of the plaintiff, Harry J. Strong, and upon the completion of the taking of that deposition, unless otherwise stipulated by the parties, the defendant, Union Electric Power Company, is directed by the Court to report such fact to this Court by way of motion for the setting of future depositions heretofore requested to be taken by the defendant, Union Electric Power Company, at which time this Court will rule upon the time and the place and the circumstances of the taking of the depositions of the other witnesses whose depositions have been requested by the defendant, Union Electric Power Company.

(8) Although the motion herein filed resulting in this order has been filed on behalf of the Union Electric Power Company

only, all defendants herein are privileged to appear and examine or cross-examine the witnesses called by the defendant, Union Electric Power Company, if they wish to examine said witnesses and no further orders will be granted by the Court to any of the defendants herein for the taking of the depositions of these witnesses requested to be examined by the defendant, Union Electric Power Company, nor may their further depositions be taken on notice except for good cause shown.

May 23, 1955

Filed Order appointing Wayne G. Cook as Special Master in connection with taking of discovery depositions, Riley, J. (R. 23.)

June 6, 1955

(The deposition of Harry J. Strong commenced on June 6, 1955, at the hour of 9:40 o'clock a.m., at Room 725, Davenport Bank Building, before Michael T. Organ, appointed by the court as commissioner to take said deposition. The transcript of the proceedings shows the following with reference to the attorneys and counsel for the plaintiffs, to-wit:

"Appearances:

James D. France,
Xavier C. Nady,
France, France & Nady,
First National Bank Building,
Tipton, Iowa.

James R. McManus,
Allan R. Shepherd,
417 Fleming Building,
Des Moines, Iowa.

Haley, Doty & Wollenberg,
1735 DeSales Street,
Washington, D. C.
(OF COUNSEL)
Attorneys for Plaintiffs,

By
Mr. James R. McManus,
Mr. James D. France,
Mr. Xavier C. Nady."

One or more of the attorneys of record in this appeal appeared on behalf of each of the defendants at every session during the Strong deposition. The following colloquy ensued between the Special Master and counsel prior to the swearing of the witness:)

SPECIAL MASTER WAYNE G. COOK: Gentlemen, the statement that I wanted to make is this: it may have to be prefaced a little bit. I think most of you know more of the background regarding my appointment than I myself.

About three weeks ago, as I recall the time, Judge Riley called at my office in Davenport, found I was in the Supreme Court at Des Moines, and asked if I could stop at his office for a few minutes before I caught my plane, and I had about thirty minutes with him. He saw me again the following Friday, when he was here in Davenport.

At the first meeting, he inquired whether I would be willing to serve in this rather unusual capacity during the taking of depositions, and perhaps some other discovery process here. My statement to him was that I was perfectly willing to serve, providing it was agreeable with everyone, but I did not want anyone to be embarrassed if they saw fit to prefer that I should not serve.

At that time I told Judge Riley, and I have no doubt that he conveyed to Counsel who were present at the hearing that

followed my interview with him, that I had previously represented Iowa Southern Utilities Company, and, much earlier, had represented generally, as a member of the firm of Lane & Waterman, the Iowa-Illinois Gas and Electric Company, or its predecessor. It had not been organized.

I also told him that I had had one special appointment by Iowa-Illinois in a matter pending in Peoria, which had been decided, ninety per cent of it, by Judge Adair some six or eight months ago, and that I thought that matter was entirely closed, and as far as I was concerned, that my employment had terminated.

Judge Riley sent me a tentative order. I do not recall the exact date it arrived here, I have been away for a week. At any rate, it arrived in the morning mail, and a letter accompanying it, saying he would call me at 10:30 during a recess in a jury trial he was holding, to ascertain whether I felt the form of the order could be improved upon, whether there were any powers that ought to be specifically mentioned, or the like. I made one minor suggestion about the thing when he did call at 10:30.

Before noon of that same day, there came in the mail a notice of appeal from the last order that Judge Adair had entered at Peoria.

The history of the matter was simply this: the question was one of jurisdiction of the court over a suit against Iowa-Illinois, the Davis Power interests in Moline, and Moline, or Sears, the Federal Power Commission, the Illinois Commerce Commission, and the Davenport City Council. I was associated in that with attorneys at Peoria, primarily to raise the question of jurisdiction of the Federal Court in Illinois over all of the parties, and motions to dismiss were filed and argued last summer, and within a very short period Judge Adair sustained the motions as to the public bodies, but did not rule upon the motion as regarded the other defendants. That is the motion upon which his ruling had been made, prior to Judge Riley's discussion with me, and, frankly, I wasn't even aware that we were still within the appeal period.

When the notice of appeal came in, I debated whether I would call Judge Riley, but it was the end of last week, and I figured I had to be in Des Moines on Tuesday, I would see him, that would be the easiest way. When I got to Des Moines

on Tuesday, I found that Judge Graven was holding court for him, and he was out of town, and he did not get back until Friday, and I did not see him until late Friday afternoon.

At that time he asked what I thought should be done, and I said that I had assumed that his order, which was tentative, that is, he had provided, I believe, for any objections on the part of people who were not there, and had not expressed a willingness that I serve, should be filed by June 2nd. That had gone by. I said the only thing I knew was, rather than disrupt the whole schedule, for me to inform Counsel of the situation this morning, and give them another opportunity to express any objection they might have to my serving in this capacity.

I want you to understand that my position has been from the beginning, and still is, that I do not want anybody to be embarrassed at raising any question about my qualification to do whatever this job is, and I am sure I don't know exactly what it is, or what it will develop into. So Judge Riley left it that I should make the further disclosure, which had not been made at the time that he discussed the matter with Counsel, and before he entered his order.

MR. McMANUS: Mr. Cook, at the meeting in Des Moines before Judge Riley on May 16th, I informed Judge Riley that I was thoroughly aware of your connection with two of the defendants heretofore, and that I had confidence in you and that the plaintiffs had no objection to your acting as Special Master in connection with the discovery proceedings.

I think, from what you have said, that you are still connected with the case in the Federal Court in Illinois, involving the question of the power to fix rates. Isn't that the question involved in that case?

THE MASTER: The question involved, actually, fundamentally, is the question of the power to fix rates. In other words, the question is that the Federal Power Commission, not the City Council, or the City of Davenport, is the body to fix rates.

The only question which has been decided, and part of which, only, is now on appeal, that is, the portion that related to the injunction against the two companies, or the company and, actually, the Davis Estate, which is not a corporation, is whether the court in Illinois had jurisdiction.

To the extent that there has been served a notice of appeal in a case in which I did prepare the motions and participated in the arguments before Judge Adair, on which his decision is based, that has been revived with respect to the remaining persons, companies or defendants by the appeal from the order sustaining the motion.

I have not been informed as to whether I was expected to follow the case or not. My employment from the beginning was a special employment to analyze the question of jurisdiction, and prepare the pleadings, and of course, in part, the brief on which Judge Adair's decision was based.

MR. McMANUS: At this stage of the proceedings, they are merely legal questions involved, is that correct?

THE MASTER: That is absolutely true. We just received, I noticed it this morning, it came in last week, a praecipe, or designation of the record, the complaint, and the motions, and the orders which Judge Adair entered.

MR. McMANUS: The plaintiffs will have no objection to your continuing to act in this matter.

After certain other discussion, the Master left the hearing room and the deposition of plaintiff Harry J. Strong commenced on June 6, 1955. (Tr. 39.) It was continued on June 7 (Tr. 139), June 8 (Tr. 206), June 9 (Tr. 285), June 10 (Tr. 441), June 13 (Tr. 553), June 14 (Tr. 660), June 15 (Tr. 734), June 16 (Tr. 860), June 17 (Tr. 1012), June 20 (Tr. 1135), June 21 (Tr. 1270), June 22 (Tr. 1426), June 23 (Tr. 1604), and June 24, 1955 (Tr. 1717).

Strong testified: I reside in Davenport, Iowa; I have been a director and a member since First Iowa was incorporated, originally being an assistant secretary and currently am secretary-treasurer and general manager; I have no other business activities other than in connection with the Cooperative but I have had minor farming interests since shortly before First Iowa was incorporated when I rented 26 acres from "Mr. Frank Gillmor, * * * specifically for the purpose of qualifying as a farmer, as we thought it was required at that time"; I currently own 26 acres of land which I rent and did dispose of a farm in Muscatine County about 18 months before the time of this deposition, a farm I got from Mr. Byron Layton or his wife

after Mr. Layton passed away in 1949 or 1950; My only other employment since being connected with the First Iowa was three weeks as an examiner for the Iowa Employment Service; I worked in the electrical field in 1918 and 1919; from 1927 to 1933 I was promoting rural electrification for Iowa Electric Company and other utilities as well by contracting with farmers to be their agent to secure electricity and then supervising the installation and wiring for the farmers, "I was the farmer's agent" * *, *; "never an employee of a private utility"; I have managed the Muscatine County Rural Electric Cooperative Association and its successor, the Eastern Iowa Light and Power Cooperative; I have been connected with electric generating and transmitting concerns of one kind and another "all my life", thus giving me "extensive familiarity". (Tr. 39-43, 47-51, 156-157, 208-210). Mr. F. A. E. Gillmor is from Dixon, Iowa, lives on and operates a farm, and is one of the original incorporators of the Cooperative. (Tr. 47, 49) The allegations of the complaint were based largely upon information which I have furnished the attorneys. (Tr. 41, 62) Strong further testified:

(Tr. 71) Q. Now, those then are the only facts upon which you base this conclusion?

A. There are many, many facts as indicated in the questions and answers of my interrogatories. I couldn't possibly recite them all without having that list before me, but there are so many, I would say hundreds of overt acts.

Q. Now, Mr. Strong, of your own knowledge, I am concerned with finding what those facts might be.

A. It is so voluminous it is impossible for me to remember them all without having the list before me.

Q. You are at perfect liberty to use anything that you have at your disposal with regard to refreshing your memory in connection with this matter, but by the same token, I want from you the answers as to the facts as you know them in connection with this matter.

A. What I have said to you I know. There are others. I would presume the only way for me to answer him would be to get a list of the interrogatories.

MR. McMANUS: He has invited you to refresh your memory from anything you have.

THE WITNESS: Unfortunately we are taking this deposition in a room that we were not prepared for until this morning, and my records are not here.

MR. McMANUS: He says you can refresh your recollection.

THE WITNESS: I will refresh my memory and answer that question.

MR. WALKER: That is fine.

After an adjournment for lunch, during which time the witness was invited to refresh his memory, the following ensued:

(Tr. 81) Q. Whatever you can tell me now as to those facts is what I want, from your personal knowledge, with regard to the acts of the defendants.

A. As I say, these acts commenced during the hearing before the Executive Council.

Q. What did those acts consist of?

A. I cannot answer or detail them until I have available the transcript and records, and they are in the Post Office Building. I will make them available, I will check them tonight, and have them for you.

Q. Do you mean to tell me, then, that all of the facts upon which your judgment was based with regard to the alleged conspiracy are based upon the Federal Power Commission hearing reports?

A. No, sir. There was no such statement made. I said the Executive Council hearing is part of what is required—

Q. Are there any other facts?

A. (Continuing) —plus the daily expense report sheet, which is like a diary to me, and which has been supplied to the defendant, and taken in microfilm form. Those are not available for me to get during the noon hour, during the recess for lunch. I shall get them, and have them, and from that I can give you the answers to those particular questions, which are but a small part of the answer to your question. (Tr. 106)

* * *

Q. Then you have no independent recollection of any acts other than would be disclosed in the documents which you have previously delivered?

A. I would say those documents would bring to my mind many things that I cannot bring back now. I am not trying to be evasive. I want you to know that. You go back 11 years, or how many years—go back seven years, and take the 11 years prior to that—I am mentally confused by you confining it to prior to the issuance of the license.

Q. But, Mr. Strong, it should be fairly easy for you to recall independently of any records at all, some of the things about which you complain in Paragraph 10(a) in view of the fact that that allegation confines itself to the activities of the defendants prior to the issuance of the license which must have been a rather important part of the life of your Co-operative?

A. Well, I might say that Mr. Nady questioned me for many, many days to try to bring that chronologically from the start of our incorporation in 1938, and Mr. McManus questioned me for days upon days, and it took a lot of weeks, and I might say months of work, and I might say three and a half years prior to the filing of this complaint to come to the point of filing a law suit. To try at this time to confine myself prior to July, 1948, or September—I should say September 1, 1948, when the license was issued, I would have to go through the records to get many, many instances of—

Q. Let me ask you this question. Would the records that have been produced by the plaintiffs in the form of documents and in accordance with the order of the court reflect all of those acts about which you complaint in Paragraph 10(a)?

A. I doubt that they would, Mr. Walker, very much. In other words, there—

Q. Well, it seems to me that we then are in a position where you have, you say, no independent recollection of any acts unless they are in these documents, and then you say the acts might not necessarily be disclosed by the documents.

Now, if they are not disclosed by the documents, and I can readily appreciate that you want to see those documents before you testify to those matters about which you have no recollection now, there must have been other acts then about which you have independent judgment and about which you can testify, or in the alternative you have no independent knowledge of any other fact. Now is that a correct interpretation of what the situation is at the moment?

A. No, that is not true at all. I certainly don't agree when you say that unless the instances are specifically set out in the transcript of the hearing before the Executive Council, or the Federal Power Commission, or before the courts—(Tr. 137)

* * *

Q. Well, now, is it a fair statement for me to make that from your own independent knowledge, and from what knowledge you can gain from a reference to the answers to the interrogatories, there are no other overt acts of these defendants about which you can now testify?

A. That is not true at all. If the records are here, I can testify—

Q. I haven't finished. From those records that you have here now. In other words, do these answers to the interrogatories bring anything else to your mind with respect to the allegations of 10(a)?

A. I am trying my best to think. I just at this particular moment can't recall the many things that I know are there. (Tr. 179)

June 7, 1955

Q. Now, was there any other evidence of any kind at that time during those hearings about which you have not testified that in any way led you to the conclusions asserted in paragraph 10(a)?

A. I would say that when I have time to check the transcript of those hearings there are many, many other answers that can be given to that question and pertinent to the acts of

the private utilities opposing the building of the project, or let me say, the licensing of the project. (Tr. 190)

* * *

Q. Would it be helpful if we would adjourn now until this afternoon?

A. I question it. I would say it would take me probably six to eight hours, probably a day to go over the transcript of the hearing before the Executive Council—both hearings of the Executive Council of the State of Iowa; the transcript of the Federal Power Commission, which is, my gracious, thousands of pages.

And to further go through the minutes and my daily diary with expense accounts.

I wish the Lord would bless me so that I could recollect all of them, but it is impossible at this time.

Q. I take it from what you have said that, so far as you have any independent recollection, without referring to these documents that you speak of, you have nothing further to add with regard to any further independent knowledge as to what these defendants might have done that led up to the allegation of 10(a)?

A. I believe that there are many more things that may easily come to me as time goes on, which will tie together, both after the license issued—which would tie together prior to the license issuing.

Q. But of this moment, you are in a position where you are not able to testify further with regard to 10(a) without going into your documents, is that correct?

A. Without going into it, I would say I can't, I haven't prepared myself by sufficient examination to give you, voluntarily, other items.

June 8, 1955

There are many, many more facts other than what is in the record of the Federal Power Commission that the defendants did to which we referred in 10(a). (Tr. 229) There are many,

many more things that the documents and records that we have as yet not gone through will bring back to me in answer to your question on 10(a). There are many, many more answers that we want to give relative to this. (Tr. 236) Now, I say to you that there are many more other acts of these defendants as alleged in paragraph 10(a). If Mr. Nady was here with his notes, he could refresh me as he read them, and I could say yes, and those notes are not here. We have not had time during this adjournment to go into the thousands, or hundreds let's say, of letters that will refresh me to the many, many things that I know are still untold. I have to go into them to recollect them. (Tr. 247) At this time I do not have any independent recollection of any other acts of these defendants as alleged in Paragraph 10(a) that are not contained in those records filed and produced and that I have not testified to. (Tr. 262, 263)

June 10, 1955

I will have to check the records to see if 10(b) refers to any other agreements than that of July 4, 1948. I certainly don't want to say there were not. There might well be many more things, and I am sure that there are, that would be that which I would consider an agreement. (Tr. 490) I know of no other agreements at this time to which we referred in 10(b) and until I can check further I cannot recollect. (Tr. 491)

June 13, 1955

Q. This morning, Mr. Strong, you told me that over the noon hour, you would attempt to determine the dates of the contract that you had with the Allen and Company during the period in which there was a conversation between Mr. Parrott and you on July 6, 1950 and October 6, 1950. Do you now have the date of that contract?

A. I do not.

June 14, 1955

I know that there are further matters with respect to the attempts of defendants to prevent issuance of a license as alleged in paragraph 10(b). There are many things, I am sure,

that will come to my mind from a further search of the records of First Iowa. (Tr. 677) I am not prepared to testify further with respect to 10(a) or 10(b) at this time. (Tr. 681) I don't have any recollection of any other conversations relating to 10(c) at this time. There might well be more. I can't recollect them at this time. (Tr. 695) There are more matters relating to 10(c). I shall try to recollect them. At this time I can't give you anything further. I am sure I can later. (Tr. 703) There are many more, I am sure, for me to recite relative to 10(c). I have not had time to get the full information to answer the questions that you ask. (Tr. 711) I am sure that I have not covered all the facts as alleged in paragraph 10(c). There are others. (Tr. 719)

June 15, 1955

There is of course more facts to support 10(c) of our complaint. There are more facts in regard to matters alleged in paragraph 10(c) other than what I have told you. I cannot recollect them at this time. (Tr. 770)

With respect to the allegations of paragraph 10(d) of the complaint, there are more facts than I have given you. I shall have to check the records, books and papers to refresh my memory, but at this time, I cannot recollect. (Tr. 825) I am sure that there are matters to support paragraph 10(e) of the complaint that I have not previously discussed. Of course, I will want to recheck the records and refreshen my mind so I can give you the answers. (Tr. 827) I feel that there are instances to support 10(e) and I shall attempt to go over the records and alert my mind so that I can testify as to them. (Tr. 829) I am sure that there are matters that have come to my knowledge since the filing of the complaint that pertain to paragraph 10(e). (Tr. 832) There might well be knowledge I have now with respect to 10(e) I did not have at the time we filed our complaint. If there is, it is in the memoranda and data I have given to counsel, or that I have that will permit me to recollect and testify further as to 10(e). (Tr. 835) With respect to 10(f), there are other matters that I have not testified to. As soon as I have time to go over that I would be very glad to testify on it. (Tr. 838) There are other matters relative to 10(f). I am not alert to them and not prepared to testify. (Tr. 840)

June 16, 1955

I cannot at this time give any other independent facts that I have in connection with paragraph 10 of the complaint that I have not previously testified to. There are others, but as yet I have not completed my examination of the records and am not prepared to testify at this time any further on 10 that I can think of. (Tr. 908)

June 17, 1955

There are more facts with regard to the allegations of paragraph 10 of the complaint, but I don't believe that I can give you any further information until I can go through a search of the records. (Tr. 1031)

June 20, 1955

Referring to paragraph 12 of the complaint, there are other efforts we made to finance this project. I can't recollect at this time there having been so many until I can check the records. (Tr. 1146) Referring again to paragraph 12, I know there are more, and I shall try to get that information for you. At this time I can't recollect the other things so as to be able to testify to them at this time. (Tr. 1162)

June 21, 1955

I can't recollect of any other information as to paragraph 12 at this time. It having been several days since we discussed paragraph 10 of the complaint, I can only say that there are other facts than what I have testified about, but I can't recollect them. I haven't had time to go into all of the records, to say to you that what I have testified to covers it all. At this time I can't recollect of anything further to testify on. (Tr. 1280, 1281) With respect to paragraph 13, there might well be more, I can't recollect them at this time, and without repeating them I believe the answers have been given as much as I can recollect at this time. (Tr. 1288) As to the matters referred to in paragraph 13, I can't recollect at this time any matters not previously testified to or answered in the interrogatories. There are more, and I cannot recollect at this time without having the oppor-

tunity to examine all the records in this case. When I have had the time to go over all of the records, there might well be more. I can't recollect them at this time. (Tr. 1291) I cannot say that when I gave you the names of the banking institutions for paragraph 14, that I covered them all. I cannot recollect more than that which I have testified to at this time. There might well have been, and I am sure there are others which I cannot recollect at this time. (Tr. 1295) I am sure that when I can go through my records, there are others, and I shall try to get a recollection of that and give it to you. I feel certain that there are other answers to paragraph 14 of the complaint concerning defendants' unfair competitive practices, about which I have not previously testified, but until such time as I have an opportunity to go into the records and check what has been testified to, and our answers to the interrogatories and the books and the records, as furnished with the answers to the interrogatories, and in the court, and under the order for the production of books and papers, I cannot at this time recollect further matters to testify on. (Tr. 1296, 1297) As to 14, I cannot recollect at this time anything further until I have had time as necessary to go over all of the records. I would say that probably there would be more, but I cannot recollect them at this time. (Tr. 1303) My answer to paragraphs 15 and 16 is the same. Until I have time to go over all the records in this case, I have no matters I have not previously testified to. There might well be more, and I am sure that there would be and will be when I have the opportunity to go over all of the records and be able to recollect. (Tr. 1312, 1313)

On this date counsel for Union Electric Power Company commenced his inquiries of Strong relative to the financial affairs of the Cooperative and the following information was developed:

The First Iowa Hydro Electric Cooperative does its banking through my account at the Central State Bank, Muscatine, Iowa. It is through my individual account and not through a separate corporate account. The individual account has never been produced. I think I have made personal contributions to the First Iowa Hydro Electric project. I have never totaled it.

"Q. Will you explain to me why an amount of cash that you have put into this project does not appear on this sheet dated from August 9, 1952, to January 1, 1954?

A. I said, and I say again now, that the last date given on those reports, my audit might well reflect that I have put in, or handled the money might well reflect that I have more than my salary coming. If it is, it is a very small sum but I would rather believe that at this time, at that hearing, I had probably —how can I say it?—less than the total salary from the first of the organization to that date.

Q. How much actual cash money, of your own money, have you turned over to the First Iowa Hydro Electric Cooperative since its existence?

A. As reflected in that, as of my own money, I would say none."

After a short recess, Strong further testified:

"Mr. Walker, I would like to make myself clear. I can't enumerate the many times I have put money, my personal money into this situation. In other words, I was the first treasurer, those records stem from the time that I kept the records as the manager as this was kept as a so-called running account, I have no recollection of the many, many times that I have put money in, and then when advances or contributions were made, it would replace my money, and until a complete audit or a bookkeeping system is set up from those records, I certainly wouldn't have it be misunderstood that I didn't use any of my money in this. I did."

Q. Let me put it this way. As of this date, do you have any of your own money in this project?

A. I can't answer again whether I have expense money due me in addition to my salary or how close it is to being just my salary coming."

* * *

Q. Have you made any contributions in the sense that these people have made contributions as listed on this sheet, dated August 9, 1952, to January 1, 1954?

A. I think giving of my time and devoting my full time—

Q. I am talking about cash.

A. In the same sense as they advanced it?

Q. Yes, that is correct.

A. I can't say that I did. Mine would be a question of using my money until contributions came in, and then getting it back, then if we got short again, I would use my money until contributions came in.

Q. Yours was only a temporary advancement, then, in other words?

A. That is correct, I would term it as such.

Q. Now, where did you say that bank account was kept?

A. My personal bank account is kept in the Central State Bank at Muscatine."

Strong further testified as follows:

I have some records in the vault of the C. C. Hakes Company at Muscatine and at my home. I don't remember whether I have cancelled checks and deposit slips of the banking account or not. I carried it as a personal account. I was authorized to do so by the board. I don't think that my personal accounts are a part of the books and records. I won't produce anything of my personal records. As far as I am concerned, I am not offering my personal records for you to hash over. It is none of your business. None of the other members of the board of directors of the First Iowa Hydro Electric Cooperative are authorized to draw funds on this account. The only report I have ever made to the board of directors is reflected in the daily diary expense accounts and it may show the contributions made.

"Q. Of the $133,029.59 reflected in the report of August 9, 1952, to January 1, 1954, how much of that amount went through your personal account?

A. I have no way of knowing."

Strong further testified:

I cannot remember when I first started handling the funds of First Iowa Hydro Electric Cooperative. I did not always use my personal bank account but the funds were either handled

in cash or through my personal bank account. I used this account for my own personal purposes at the same time that it was being used for the deposit of the funds belonging to the First Iowa Hydro Cooperative. I cannot remember a distinct time when the First Iowa Hydro Cooperative had any substantial sum of money that was theirs and not mine. There has never been a bank account opened in the name of the First Iowa Hydro Electric Cooperative in any bank.

June 22, 1955

I do not have anything more that I can recollect concerning written agreements as alleged in paragraph 10(b) of the complaint. (Tr. 1521, 1522) I am not prepared at this time to testify further with regard to any acts of these defendants as to which I have not previously testified under paragraph 10. I cannot recollect of any at this time. I think there might well be more, and I certainly want to go into the records, because there is never a day goes by but what I can refresh my memory on something. (Tr. 1597) As long as this hearing lasts, and I keep poring over these papers as I say, I can always recollect something further in respect to the allegations of paragraph 10 of the complaint, and I will continue to do that and I want to do that. There are so many things that I certainly wouldn't want to say that I have covered them all. That is all I can recollect at this time. I believe I will be able to recall further by refreshening my memory. (Tr. 1599, 1600)

In reference to the financial affairs of the Cooperative Strong further testified as follows:

The daily diary expense account ends on February 18, 1954. As of that date it reflects all my expenses up to that time and all my disbursements. It is my opinion today that the Cooperative owes me in excess of the salary. I have no explanation for the expenditure of $18,575, collected between August 9, 1952 and January 1, 1954. I would say that some of the $18,575 did go through my bank account. I can't tell how much.

"Q. Then, Mr. Strong, how do you account for the difference in the amount of money collected and the amount of money spent?

A. I have no answer for it. As I have said, I can't answer

it until an audit is made of the books. It is my opinion they owe me today moneys as expenditures in excess of the salary that I have due me."

At this point in the transcript (Tr. 1456-1477) it reflects that Mr. M Manus objected to further questions regarding the finances of the Cooperative, and after a long discussion between counsel Mr. McManus stated that he was going to file a motion with the Master prohibiting further inquiry into finances. Thereupon, the Master was called into the hearing room and after being apprized of the issue stated that he would like a few hours to read the transcript on the matter under consideration. After the lapse of a few hours the Master returned to the hearing room stating that he had reviewed the transcript and had an idea of the background that brought this issue to a head. Mr. McManus then stated that he desired to move for a protective order pursuant to Rule 30(b) and (d) of the Federal Rules of Civil Procedure limiting the scope of examination on the ground that the proceedings were being conducted in a manner to annoy, embarrass, oppress and cause the plaintiffs needless expense, in that it was an attempt to conduct an inquisition and go into personal matters. Mr. McManus stated that the situation with respect to Strong and his Company was a matter in which the defendants were in no way concerned and that if Strong's company was satisfied with the way he kept his records that was an end to the matter. Mr. McManus further objected that this was not an accounting suit.

The Master then stated:

> "I have read the transcript, as I said a while ago, everything except, I think, two sessions, that I omitted before I got to these last two, and while I realize the delays that are involved it seems to me that those were from both sides and they are just almost inherent in the situation, and I can't say that I have observed in the matter of the general scope of the deposition anything that indicated an abuse of the discovery process.
>
> "Now, when we get down to the particular financial statement on the other hand, that has been my understanding, and I think there is some conflict in the rulings in the various Circuit Courts on the subject, but it is my understanding that discovery does require the production of

everything that has a bearing or that the adverse party has reason to think, and might lead to competent evidence, but I also think that it is not required that the parties producing records; well, take for example, your audit proposition here. I believe that when the papers are all there, and he has been examined and has gone on record, if he has unequivocably testified as to their correctness in his estimation, I don't believe that he can be required to do the accounting.

"I recognize that this is not an accounting suit, and that if you have furnished the information from which it can be ascertained, it would be their obligation to put the figures together. Now that is modified, in my judgment, a little bit by the way that the thing comes to a head on the specific question of this eighteen thousand some-odd dollars that is indicated. It doesn't balance out.

"Now, I think as to the witness, that they are entitled to interrogate the witness as to what, if any explanation, he has at this time, and if he says he has none, I would think that was the end of it, or whatever it is."

Mr. Walker then stated that he wanted to express the position of the defendant Union Electric Company with regard to the plaintiff's motion and the question of the financial records of the Cooperative, stating in part as follows:

"We think from the standpoint of damages that it has something to do with the property that the Cooperative owns and what it amounts to and what the amount of the contributions are, and are they to be repaid, and what part that plays and the ability and the capacity of the Cooperative to purchase lands and do those other things that the records in this case disclose must be done by the plaintiff Cooperative.

"We think that it has to do with the feasibility of the project and whether or not any bonding company would ever be willing to finance a project where it has been disclosed that the books and records have been kept in such a haphazard and negligent fashion. We think that among other things Mr. Strong has testified with regard to matters as they relate to his financial diary, and now it becomes evident that the financial diary is not correct. If the financial diary is not correct, it seems to me we have a right to inquire and receive an explanation from Mr.

Strong as to why it is not correct, and have him explain to us those items which do not appear.

"The evidence here discloses that Mr. Strong has said that the financial records as produced and filed in this case completely disclose all of the expenditures and all of the money that has been taken in in connection with the First Iowa Hydro Electric project, and still, in an examination of the very last pages in connection with those financial documents there is an item of $18,575.00 for which there is no explanation in these records, and which Mr. Strong should be made to explain to our satisfaction.

"Now, with respect to the question of the production of books and records, Mr. Strong, by order of Court, was required to produce all of the records that had anything to do with the lawsuit. Upon examination yesterday he disclosed that he had not produced canceled checks and checkbooks, deposit slips, and other matters pertaining to his own personal accounts.

"The reason I inquired in connection with his personal account was because of the admission made in the record by Mr. Strong that there was a commingling of the accounts of the Cooperative with his own personal account."

Mr. Walker moved that Strong "be required to produce all of the bank books, all of the check books, canceled checks, deposit books and bank statements in connection with his account, in which the funds of the First Iowa were commingled." (Tr. 1554)

He also moved that the bank produce any microfilms of their records and offered to pay whatever expense was necessary to get copies of the microfilmed bank records.

After further argument between counsel the Master then said:

> "It seems to me that on the question of the financial reports, and the accounting for the $18,000.00, or for the period there, the fact that it doesn't jibe, that the record speaks for itself as to what differences there are, and, when the witness says, 'I can give you no explanation,' there is nothing that the Special Master can do to change the situation there. Further interrogation, I presume, would get the same answer.

"On the other hand, I am definitely of the opinion that you are not required to accept his statement that this account contains all of the records of expenditures or receipts; and in view of the fact that there is the intermingling, I think you are entitled to the production of the records regarding the personal account, all of them, if they cannot be segregated; those that relate to the First Iowa Hydro Electric business if they can be segregated, and if they throw light on this discrepancy, I think you are entitled to that information.

"On the other thing, I certainly am in sympathy with the rule that gives to the Court, and here it has been delegated to me, the power to prescribe such safeguards as are necessary to prevent oppression; but frankly, Mr. McManus, I don't believe that is any indication in the record here that that is the intention. The fact that it gets into Mr. Strong's personal accounts is actually simply because of the way it was handled."

Mr. McManus argued that the financial records already produced and the answers to interrogatories by the plaintiffs were sufficient information and that oral inquiry into the financial affairs of the Cooperative would amount to a duplication. Thereupon the following occurred:

"THE MASTER: It is my feeling that the position on other sources, or other discovery procedures, cannot be mutually exclusive; certainly I cannot rule in regard to that without familiarity with everything that is produced, and all the rest.

"My understanding was that interrogatories would be asked, and answers given; that depositions may cover the same territory. Naturally, you would want more than was given in the interrogatories. You wouldn't be asking exactly the same thing, merely to get another answer to the same thing as was answered in the interrogatories, but if you don't get an answer to one question, you proceed from one to another. I really don't know what to say about that. I thought that was being recognized.

"MR. McMANUS: Here are the answers to the interrogatories that have been filed in this proceeding. Much of this time has been taken with going into matters that

were already disclosed in there, and that is the thing I am kicking about.

"THE MASTER: But even in the deposition itself, the bulk of the time has been used in inquiring of Mr. Strong what facts he had, what facts he knew of, to substantiate things, and so far I don't think any of them are down to anything except, 'Well, there are more', which indicates to me the necessity for not limiting it to answers to interrogatories.

"I realize the thing has branched off, I mean, the last few days, on this subject that has raised this particular question, which involved something quite different.

"MR. McMANUS: That is right, I never raised any question before today.

"MR. WALKER: I don't think any reference was ever made to the interrogatories, except by the witness or the witness' counsel.

"I have asked him specifically if he wished to refer to the answers to the interrogatories to refresh his memory, or any place that he wanted to look.

"I wanted his personal knowledge with respect to the matter, and I did not specifically want the answers particularly that he had made to the interrogatories, and I have not, I don't think, asked one question that was the same as the answers to the interrogatories, or as the interrogatories themselves."

The Master then stated that he would sustain the motion made by counsel for Union Electric for production of the bank account in which the funds of the Cooperative had been intermingled and that he would enter a formal order the next day after further study of the transcript.

June 23, 1955

At this time I have no other information relating to engineers other than I have testified to or furnished in the answers to interrogatories or papers produced in this case. (Tr. 1613) At this time I have no other information or facts relating to banking groups other than those I have testified to or furnished

in the answers to interrogatories or papers produced in this case. (Tr. 1616, 1617)

Q. You mean by that answer, Mr. Strong, to preclude the possibility of having further knowledge or recollection with respect to this matter sometime during the pendency of this action?

A. Nobody is ever going to get me to close the door. Nobody is ever going to let me think that there aren't things that will come to my mind while I am in bed, while I am sleeping, while I am driving in the car that I can't recollect at this time. I will never close the door. I am sure that there are more—I can't recollect them. I will be glad to testify to them if I could recollect them, but there is not an hour of this day that things don't come to my mind, and I am never going to close the door that this is off. I will give it to you as I can recollect them, and I want you to know that nobody is ever going to foreclose me in remembering things that may come later or a recollection that comes to me. (Tr. 1617-1619)

At the hearing on June 23, 1955, the Special Master dictated into the record the following order:

"On the motion of Mr. Walker appearing on page 1554 of the transcript and enlarged on page 1584, the ruling is that the witness produce any and all check books, canceled checks, deposit books and bank statements relative to his bank account which he has testified was used for funds of the First Iowa Hydro Electric Cooperative which he has in his possession covering the period from the inception of said account to the date of commencement of this action and that such production be made at the opening of the hearing on Friday, June 24, 1955.

"Further ordered that the witness forthwith apply to the bank for the originals or copies of any ledger sheets, bank statements, canceled checks, deposit slips and other records in connection with said account which the bank has and which the witness cannot himself produce, and that he authorize and direct the bank to supply him with such originals or copies, including microfilmed or photographic records, the cost or expense of procuring them to be paid by the Defendant Union Electric Power Company, and that the documents be produced or cause

be shown for their non-production by the witness within 10 days from the announcement of this ruling.

"Now, that is the ruling on the motions which were made yesterday." (Tr. 1684-1685)

Counsel for plaintiffs suggested an adjournment for two weeks for personal reasons and to allow defendants an opportunity "to get your checks in" (Tr. 1676). The Master ordered that after the session on June 24 the deposition be continued to resume on July 11, 1955, and further ordered that the bank records be produced at the office of the Master, stating:

> "Let the record show that said bank records referred to shall be available for inspection to any of the parties hereto or their representatives." (Tr. 1686)

June 24, 1955

Strong was questioned during the morning on matters other than financial affairs of the Cooperative and at Noon on June 24, 1955 the deposition was adjourned pursuant to the prior order of the Master to resume on July 11 (Tr. 1780). At the conclusion of the hearing on June 24, the following statement was made to Strong by Mr. Walker, counsel for the defendant Union Electric Power Company:

"Now, Mr. Strong, the hour of noon is fast approaching. When we recess today and come back again in two weeks, I will again inquire of you, among other things, about those matters which you have not given complete answers to. I will further inquire of you with regard to the matters that you have testified you are sure you will be able to give me further information on with respect to the allegations in this complaint.

"In addition to that, I will question you in connection with the question of preparedness to do business in this project, and I will question you further in connection with the finances of the project.

"I tell you this now so that over the next two-week period, you will be able to devote your time to those matters, so that you can come back here in two weeks prepared to answer those questions.

"I think that the record should show now, Mr. McManus, that by agreement of counsel for the plaintiffs and the defendants, and pursuant to the order of the Special Master in this case, we will now recess the taking of the deposition until 10:30 A. M. on July 11, 1955, unless you have something else you want to say.

"MR. McMANUS: I merely wanted to suggest, Mr. Walker, that the proceeding has extended over three weeks, and you have so completely and thoroughly delved into many of these matters in such minute detail, this witness has not been afforded time and opportunity to answer and dig out the multitude of facts that you have sought to elicit, because the interrogation extends over a long period of time, by that I mean it embraces a period of 17 years, and it has been physically impossible to obtain, after the sessions were over for the day, all of the information that you are seeking, and Mr. Strong will try to get as much of that together as he can during this recess.

MR. WALKER: I am fully aware of that, Mr. McManus, and I mentioned it only to give Mr. Strong some idea of what I would be interested in when he returns in two weeks. I hope, Mr. Strong, that the two-week period will give you an opportunity to get those facts for me."

June 27, 1955

During the adjournment, counsel for defendants learned from Mr. Edmunds of the bank that the necessary checking and copying of bank microfilms would take bank employees about 100 days, and accordingly selected Bawden Brothers, the photographers who had microfilmed the other documents produced by plaintiff, as their representatives in accordance with the foregoing direction of the Special Master. (Tr. 1803-4)

The bank informed defendants' counsel that Strong had given oral instructions not to use anyone but bank employees, which would delay the copying far beyond the time limit. (Tr. 1803) Being advised of these facts by counsel for the defendants and of a request by the bank for instructions, the Special Master telephoned the bank and advised them that the use of Bawden Brothers was within the scope of the orders and that he would send them a written order confirming that fact. (Tr. 1795-96)

Accordingly, on June 27, 1955, the Special Master trans-

mitted to plaintiff Strong, to Central State Bank, and to counsel for defendant Iowa-Illinois, an order expressly reciting that the bank was authorized to employ assistance outside of its own staff in preparing the records, that Bawden Brothers, Inc., were hereby authorized to photostat the records, and that the bank was authorized and requested to send to the Special Master a list of the documents sent to plaintiff Strong. (Tr. 1793-4)

July 11, 1955

At the reconvening of the deposition on July 11, 1955, plaintiff being represented by counsel of record and each of the defendants being represented by one or more counsel, and the plaintiffs Strong and Gillmor being present, plaintiffs' attorney McManus, at the commencement of the proceedings stated that he had a matter that he wanted to take up with the Special Master. Counsel for the plaintiff then asserted that the act of the Master in entering the order of June 27 was an act showing "partisan interest" and that "you ought to withdraw and disqualify yourself from further acting in the matter." (Tr. 1792) Plaintiff's counsel also complained of the fact that although on June 6, 1955 the Special Master had freely disclosed that he was representing defendant Iowa-Illinois in the Peoria case, he had failed at the same time to mention that his firm was representing in the same case the Davis Estate, which sells power to that defendant. (Tr. 1798-9) Plaintiff's counsel suggested that the deposition be continued in order to afford an opportunity for him to file an application with Judge Riley for the removal of Mr. Cook as Special Master. (Tr. 1800)

Plaintiff Strong broke into the hearing with the following statement (Tr. 1809-11):

"THE WITNESS: Mr. McManus, I would like to say that it is a manufactured lie to say that I told that Bank not to get anybody but their employees.

"MR. McMANUS: That wouldn't make any difference.

"THE WITNESS: . . . . I didn't even tell Mr. Edmonds or anyone to use no one else but their employees, that is an absolutely manufactured lie.

"MR. McMANUS: It wouldn't make any difference whether you did or whether you didn't because you would have—

"THE WITNESS: Mr. McManus—

"MR. McMANUS: Just a minute.

"(continuing)—a perfect right to tell the Bank that you didn't want anybody except the banker's employees examining your checks.

"THE WITNESS: . . . .

". . . .

"I want you to know that this is a manufactured lie, either through the Master, Mr. Edmonds, or the Lane & Waterman firm, to manufacture a lie. I didn't tell anybody this. I have no objections to having them today, or tomorrow."

The Special Master explained that he had entered the order of June 27 after he had been informed that it would require far in excess of ten days for the bank to produce its records if it all had to be done by bank personnel; that it is recognized at the time of the original order that bank personnel might not be able to do the work but that it was also definitely felt that photostating might have to be done by outside parties and that the question of whether it was done by bank personnel was wholly dependent on whether they could do it expeditiously and within the ten day period. (Tr. 1795-97) The Special Master also stated (Tr. 1798):

"I might say this that I don't know what place the representation of Davis Water Power has on this particular phase of the question.

"That was a matter that was inherent in the disclosure made in the beginning relative to the appearance in the Peoria Light case.

"I don't regard it as having any bearing here, and while I have no criticism of counsel raising it, I want the record to show that I disagree definitely with his conclusion that the entry of this order indicates any partisanship in the conduct of this hearing insofar as it is within my province to supervise it."

July 12, 1955

The deposition of Mr. Strong continued during the morning of July 12, 1955, on matters other than finance, but in the afternoon plaintiff's counsel announced that he had informed the District Judge by telephone of his intention to file an application for removal of the Special Master Cook and he suggested adjournment until a ruling was obtained from the court. (Tr. 1910) Mr. McManus stated that Judge Riley had indicated to him that the matter might be heard sometime in the following week. Accordingly, after discussion between counsel for plaintiffs and defendants, the depositions were recessed on July 12 under the following stipulation:

"MR. WALKER: Let the record show, then, that by agreement of the attorneys for the plaintiffs and the attorney for Union Electric Power Company, the present deposition of Harry J. Strong will be recessed from this date until 10:30 a. m. on Monday, July 25, during which time the plaintiffs' counsel will expect to file a motion with the court contesting the appearance of the present Special Master, and which said application or petition will be presented to the court in the interim and argued on Thursday, July 21.

July 18, 1955

Filed plaintiffs' motion to vacate order appointing Special Master Cook and to remove Special Master and to quash portions of the discovery proceedings.

July 21, 1955

Filed plaintiffs' motion to vacate order appointing Special Master and to remove Special Master Cook and to quash portions of the discovery proceedings.

July 21, 1955

Filed amendment to plaintiffs' motion to vacate order appointing Special Master and to remove Special Master Cook and to quash portions of the discovery proceedings.

July 21, 1955

(Abstract of proceedings before Riley, J. on July 21, 1955, re plaintiff's motion to vacate order appointing Special Master and to quash portions of the discovery proceedings.)

The hearing was opened by the Court. In addition to attorneys for the parties Harry J. Strong was present in person as well as the Special Master Cook.

The Court stated that the hearing was called for the purpose of the motion of the plaintiffs and the resistance of the defendant Union Electric Power Company. Thereafter there proceeded a discussion between the Court and Mr. McManus for the plaintiffs and Mr. Cook as Special Master, at which time the Special Master was invited by the Court to make a statement.

Mr. Cook then proceeded to state to the Court that he was in a little difficulty as to how far he should go in presenting the matters related to the proposition that was involved in the motion of the plaintiffs, and called the Court's attention to the fact that there was great discrepancy as to the factual situation. The Court thereupon advised Mr. Cook that he was not requiring Mr. Cook to make a defense. (Tr. 5)

In his statement Mr. Cook said that he undertook the job as Special Master at the request of the Court and on condition that it was agreeable to all parties. (Tr. 6)

Mr. Cook then related the fact that he had informed counsel and the Court of an action pending in the Federal Court in Peoria in which he was involved that had involved one of the defendants in this action and which case he thought was settled, had been appealed, and that thereafter he was in a quandary as to how to handle the matter. He related that he had contacted the Court and they agreed that he would make a disclosure at the beginning of the Strong deposition in Davenport. (Tr. 6, 7)

Mr. Cook went on then in his statement to say that at the time of his disclosure to all counsel he had named the Davis estate which his firm represented. At this point the Court told Mr. Cook that it was not necessary for him to make any further statement but that Mr. Cook was free to say anything he desired. Mr. Cook thereupon stated that he was not motivated by a desire to continue to serve but that he did not like the idea of

being in the position of quitting when he was under fire and that if the Court could find any way to relieve him without confirming the charge that was filed against him as an advocate with bias that he would be delighted to be relieved from further responsibility. (Tr. 9)

The Court then stated that he had examined the motion of the plaintiffs and that he understood that the motion falls into three categories. 1. to vacate the order of appointment, 2. to remove the special master, and, 3. a motion to quash a portion of the proceedings, i.e. all proceedings after June 22nd. The Court called attention to the fact that his understanding was that the Special Master had only been called twice. Once in connection with where the deposition hearings were to take place, and the other made as a result of a motion made by counsel for Union Electric for the production of bank records relating to the account of the witness, Strong insofar as there was a commingling of funds of the First Iowa Hydro Electric Cooperative in his personal account. The Court indicated that he understood that the Special Master had sustained the motion of Union Electric and that he would certainly sustain the ruling of the Special Master for the reasons given by the Master with regard to the question of the place where the deposition was to be taken. The Court further stated that it would sustain the ruling on the motion of Union Electric for the production of documents for the reasons given by the Special Master and would adopt the reasons which were given by the Special Master. (Tr. 11)

The Court went on to state that one of the reasons given for the vacation of the order appointing a Special Master was the failure of the Special Master to sign an oath, but the Court held that that was not necessary under the rules as interpretated by Newcomb vs. Wood, 97 U.S. 581. The Court held that Rule 53 requires no oath by a Special Master and went on to say that the Master in this case being Wayne Cook, had unusually limited powers, that ordinarily a Special Master was appointed that the Courts could refer the matter to him on the basis of the statement of the testimony, hear presentation of the law, make findings of fact and conclusions of law, after which they would be required to report to the Court, with the privilege of the party to file exceptions and take further evidence if the Court desires or feels it is necessary. (Tr. 12)

Further discussing the deposition, the Court indicated that it was conscious of the fact that the taking of the deposition was going to require considerable time and that it was apparent that defense counsel wanted complete discovery proceedings. Judge Riley then indicated that he had contacted Judge Gardner, Chief Judge of the Eighth Circuit, and that he was aware of the fact that the appointment of the Master shall be the exception and not the rule and he wanted the approval of Judge Gardner. The Court then volunteered that Judge Gardner had told him he thought the appointment of a Master in this case under the circumstances was eminently desirable. (Tr. 13)

The Court then went on to discuss in detail the manner in which he concluded who he would appoint as Special Master and how the appointment came about. Judge Riley then discussed a meeting in his chambers on May 16th at which time Mr. McManus for the plaintiffs and counsel for defendants as are represented locally in Des Moines and counsel for Union Electric were present to discuss the time and place of the taking of the depositions and reviewed the discussion that was held at that time concerning the proposal of the Court to appoint Mr. Cook and the agreement by counsel on both sides to the appointment only after plaintiff's counsel had retired to the library to discuss the matter when the Court disclosed to them some of the previous activities of Mr. Cook on behalf of one of the defendants. (Tr. 15)

The Court then went on to confirm the statement previously made by Mr. Cook as to the manner in which Mr. Cook would make disclosure of any development of the appeal in the case in the Federal Court in Peoria. The Court then stated that he would affirm and did affirm the first ruling of Mr. Cook with regard to the place of the taking of the depositions and completely approved the ruling of the Master with regard to the production of documents. (Tr. 17)

The Court then discussed the order of the Special Master of June 27th, which was issued by the Special Master ex parte, as to how the production of documents was to be accomplished. (Tr. 18) The Court proceeded again to approve the acts of the Special Master. Mr. McManus then discussed with the Court the question of when Mr. Cook had ordered the production of documents and discussed the use of outsiders in the bank and

the Court stated that it was inherent in the ruling that photostatic copies should be made of the bank records. (Tr. 23)

The Court again stated that he would rule as the Special Master had it been brought to him and stated further that he would consider also that it was the duty of the Master if the purpose of his initial order was to be accomplished to take such steps as were necessary to get it done. (Tr. 24) This answer was made to Mr. McManus who asked if the court understood that the Special Master had called the Bank and asked it to permit outsiders to come in to photostat the bank records and had later made an order covering the situation ex parte without any copies of the motion or copy of the order having been filed or presented to the plaintiffs' counsel. It developed that the order was made on the application of Iowa-Illinois which application was made verbally. The Court stated that as Special Master, Mr. Cook had the power of this Court to do everything that he had done. (Tr. 25)

The Court proceeded to let Mr. McManus introduce what portions of the record he wished and in discussing the matter further the Court said:

> "It is significant that no objection was raised to the qualifications of the master until the adverse rulings came on the matters affecting the bank account of Mr. Strong." (Tr. 29)

The Court proceeded to state that he felt that all counsel were fully informed as to Mr. Cook's connection with the Davis estate and that there was no failure to disclose. (Tr. 31)

The Court proceeded to state:

> "I consider that there is no warrant for the charges." (Tr. 32)

Thereafter, Mr. McManus called Mr. Walker as a witness for the purpose of identifying the record made at the deposition, bringing out the fact that Walker had been conducting the examination of the witness Strong. After an interplay concerning the exhibits and at the Court's request McManus and Walker agreed to meet after the hearing and agree upon the record. Walker was then further interrogated by McManus concerning

his activities on June 25th, 1955, at the Central State Bank in Muscatine, Iowa. Thereafter, McManus attempted to offer a skeleton transcript of proceedings in connection with the Davis estate, but the Court held that it was not necessary to offer them since they had been made a part of the record by adoption to the plaintiffs' motion.

The Court indicated that he had read all of the portions of the transcript of the deposition which affect the matters under discussion, and that he had read the motion as amended and that he was familiar with the substance of the resistance filed by Union Electric. The Court found that everyone acquiesced in Cook's appointment; that he adopted the basis of Cook's ruling on the motion to produce the bank account of Strong and bank records and went on to say:

> "I cannot find anything that causes me to believe that he has displayed any unfairness; that he has displayed any partiality; that he has displayed any bias; that he has displayed any partisanship, or that he has has shown any lack of disinterestedness. I am using the language that you have used, sir, in your motion [addressing Mr. McManus], and I cannot so find. Nor do I find anything that has occurred since I visited with him here in my chambers in May before the conference of May 16 with counsel: * * I may say to you that if a court in a situation in which I found myself with full, fair and complete explanation to counsel, may not appoint a Master when all of the parties have acquiesced without subjecting him to the harassment that he finds in the event of his first adverse ruling, it is going to make it very difficult for the Court to get men of ability and high integrity and a desire to render a public service to act in that capacity in the future."

The Court then overruled the motion of the plaintiffs and directed that an order would be prepared and filed, thereupon Mr. McManus asked for a continuance for the resumption of the taking of the deposition of Strong to assure the plaintiffs an opportunity to canvass the possibility of an appeal. (Tr. 89-91) The Court stated that he did not want the deposition unduly prolonged but suggested that the attorneys meet for the purpose of an agreement and offered his services in that re-

spect, if necessary, during the afternoon. Whereupon the hearing was adjourned at 1 o'clock, p.m.

July 22, 1955

Filed Memorandum and Order denying plaintiffs' Motion to Vacate order of appointment of Special Master Cook, etc. Riley, J.

July 22, 1955

Entered and filed order fixing time for resuming deposition of Harry J. Strong, Riley, J. (Said order is set out below.)

In the above matter, wherein the discovery deposition of Harry J. Strong was in progress at Davenport, Iowa, and was adjourned on Tuesday, July 12, until 10:30 o'clock a.m. on Monday, July 25, 1955, it has been asked by counsel for plaintiffs, and acquiesced in by counsel for defendant Union Electric Power Company, who is conducting the examination of the witness Strong, that the matter may be adjourned to a later date, and for cause shown;

It Is Ordered that the deposition of Harry J. Strong shall be resumed at Room 725 Davenport Bank Building, Davenport, Iowa, at 10:30 o'clock a.m. on Monday, August 1, 1955.

The mailing of a copy of this order to all parties in interest will constitute notice.

August 1, 1955

Filed order signed by Wayne G. Cook, Special Master, continuing the taking of the deposition of Harry J. Strong. (Said order is set out below.)

Subsequent to the Entry by the Court on July 22, 1955, of its order directing the resumption of the taking of the deposition of Harry J. Strong on the 1st day of August, 1955, counsel for the plaintiff has requested a further delay in the resumption of the examination of the witness Strong.

Counsel for the defendant Union Electric Power Company was requested to agree to the Entry of an order postponing the further examination of the Witness and has informed the Special Master that after consultation with counsel for all of the defendants appearing at the taking of said deposition it has been determined not to oppose the request of the plaintiffs. They also agree that the request to the Special Master shall be without waiver of the exception allowed to the ruling on the application to vacate the appointment of the Special Master and without prejudice to an appeal therefrom if plaintiffs should so elect.

Xavier C. Nady, counsel for the plaintiffs thereupon on July 29th, 1955 orally applied for a continuance until the 6th day of September, 1955.

Therefore, it is ORDERED that the deposition of Harry J. Strong shall be resumed at room 725, Davenport Bank Building, Davenport, Iowa, at 10:30 o'clock A.M. on Tuesday, September 6, 1955.

August 29, 1955

Filed notice of entry of appearance of Robert W. Bell and Bell, Farrar & Scott as attorneys for plaintiffs. (R. 28)

August 31, 1955

Filed plaintiffs' attorneys' motion to quash appearance of Bell, Farrar & Scott as attorneys for plaintiff. (R. 28)

August 31, 1955

Entered order for rule to show cause re motion to quash appearance and setting hearing at Des Moines, Iowa, at 2:00 p.m. on September 2, 1955, Riley, J.

September 2, 1955

Filed petition to intervene on rule to show cause filed by Harry J. Strong, et al, on behalf of all plaintiffs. (R. 32)

September 2, 1955

(Hearing before Riley, J., on motion to quash the appearance of Attorneys Bell, Farrar & Scott. Appearing for the plaintiffs were John Bell, of the Law Firm of Bell, Farrar and Scott, Rock Island, Illinois; J. Riley McManus, Des Moines, Iowa; Allen R. Shepherd, Des Moines, Iowa; X. C. Nady, Tipton, Iowa, and James D. France, Tipton, Iowa. Also present: Harry J. Strong, Davenport, Iowa. Defendants were not invited to appear at this hearing.)

THE COURT: We have a matter for hearing this afternoon. It arises by reason of an appearance filed here August 29, 1955, in this cause, No. 1-224, First Iowa Hydro Electric Cooperative, et al, vs. the Iowa-Illinois Gas & Electric Co., which is denominated Notice of Entry of Appearance, and it is signed by Bell, Farrar and Scott, by Robert M. Bell, attorneys for the plaintiff, entering appearance for all of the plaintiffs.

On August 31 a motion to quash this appearance was filed, and because of the pendency of the deposition presently assigned for the 6th day of September, to be resumed at Davenport, the Court entered an order for hearing on this matter today at 2 o'clock. The notice, I recognize, is short, but there is no other course to be followed.

I will be very glad to hear from you in support of your motion.

MR. HARRY J. STRONG: Your Honor, may I ask whether our petition for leave to intervene has been acted upon?

THE COURT: May I ask who is speaking?

MR. STRONG: H. J. Strong, First Iowa Hydro Electric Cooperative.

THE COURT: It is unnecessary for you to petition to intervene in this cause, because you are already a party to it. I will consider everything that is contained in this as a resistance to the motion to quash the appearance, but being already parties to the case it is unnecessary for leave to be granted you to intervene. You are already in the cause.

MR. STRONG: May I ask then that the Court rule upon our request that inasmuch as we have no counsel, and I am but a mere layman, and we are only in it as mere laymen and

have no counsel whatsoever, that a time be given to us to get counsel to properly represent us on the intervention?

THE COURT: Well, I can't agree with you that you have no counsel, because so far as the records of this Court disclose, you are represented by counsel.

MR. STRONG: I might advise the Court that the board of directors of the First Iowa Hydro Electric Cooperative adopted a resolution as of yesterday and discharged all counsel of this record, and therefore we have no counsel, your Honor.

THE COURT: And by all counsel, you mean those that are now of record for the plaintiffs in this case?

MR. STRONG: I wish to make that information known to the Court and the record, that they have been discharged and stand discharged, and we are without counsel.

THE COURT: Well, it is not as simple a process as that, because I will say for the record that it is as much the duty of this Court, as I interpret it, to protect the rights of counsel as it would be the duty of this Court, were the situation reversed, to protect the rights of the client.

I don't have the record before me excepting as I have very hastily examined the pleadings that you have filed as a petition to intervene, but on the basis of your statement I would say that that alone does not accomplish the purpose you seek, sir.

MR. STRONG: May I have a copy of that in the form of an order so we may retire then and appeal to the United States Court of Appeals in St. Louis on your ruling, your Honor?

THE COURT: Not on the basis of the record presently made. We would have a more ample record before that would be done.

You had someone else present here, I believe?

MR. STRONG: I am appearing for them; I am speaking for them.

THE COURT: And may I ask who are present in person?

MR. STRONG: Members and directors of the First Iowa Hydro Electric Cooperative.

THE COURT: Would you name them? I do not have the pleasure of their acquaintance.

MR. STRONG: Mr. F. A. E. Gillmor, who is president of the First Iowa Hydro Electrie Cooperative; Mr. Harry Imel, director; and Mr. P. H. Naber, a director.

THE COURT: Is Mr. Mitzner present?

MR. STRONG: Mr. Mitzner was unable to come. He was contacted and was unable to come.

THE COURT: Well, I observe that you are on your feet preparing to leave the courtroom. I would ask that you not do so at this time. I think it is to your interest to remain.

MR. STRONG: I think, your Honor, as a layman I feel helpless in this Court without counsel to properly defend me as an individual under my constitutional rights, which you now deny me by refusing to get counsel. We had no notice of this hearing, your Honor, till 5 o'clock last night, until we got a call on the telephone from Mr. Robert Bell, of Bell, Farrar and Scott, that he was cited to appear in this Court. We have received no notice whatsoever of this hearing. It was only by accident that we heard of it last night at 5 o'clock, and for that reason we have had no opportunity to get counsel.

I want you to know that our counsel, Bell, Farrar and Scott, withdrew from the case, advised us they withdrew last Tuesday. We have neither counsel with them nor do we have the old counsel.

THE COURT: Who withdrew, you say?

MR. STRONG: Bell, Farrar and Scott.

THE COURT: They have withdrawn?

MR. STRONG: Withdrawn to us as of last Tuesday.

THE COURT: Is there anyone here representing Bell, Farrar and Scott?

MR. JOHN BELL: I am, John Bell. I do.

THE COURT: Have you filed your appearance at all?

MR. BELL: Your Honor, we were taken in on this case. It was our understanding that if the other counsel were not aware of it they would not object, and we went in on that basis. When we found that they objected to our coming in on the case we told the members of the First Iowa Hydro Electric Cooperative that we did not want to be in the case, and we came down here today to file a motion to withdraw.

THE COURT: Have you filed it?

MR. BELL: No, I just got here.

THE COURT: It is your intention to file it?

MR. BELL: It is my intention to file this motion to withdraw as attorney at this time.

THE COURT: If you filed such a motion, that of course makes the question which we have for consideration moot.

MR. BELL: It is not our wish to be in the case if the attorneys of record do not want us in.

THE COURT: You may file—and you ask for leave to withdraw, that leave is granted.

MR. BELL: And that an order be entered to that effect.

THE COURT: Now that leaves us in the situation that existed before your appearance was entered. It makes the motion moot. It makes the question unnecessary.

MR. J. RILEY McMANUS: Also the petition of intervention. It isn't filed by any counsel of record.

THE COURT: It makes all proceedings moot.

MR. STRONG: I agree with that, your Honor. I wonder if it is not true that this question has come up for a hearing—and we were granted leave to intervene, we have asked the Court to set this for hearing in our petition, we asked for a ruling on our petition. It was granted, to intervene. We asked that the case be set, and that proper notices be sent out and it be set down for hearing.

THE COURT: Well, now you come to the question. The only thing before the Court as it now stands, since your petition is going to be on the rule to show cause, and the rule to show cause falls of its own weight by withdrawal of counsel, we have then a situation where there is nothing of record before this Court. I consider that all subsequent proceedings fall. But there is a controversy existing between you and your associates and your counsel, and that is a matter that I will be very glad to hear appropriately. I should advise you—and I do this not in the sense of expressing any opinion in the form of a final judgment—that it is not a matter in which the action that you take in the progress of the case, with counsel of record proceeding and the taking of depositions here, that the action you take can be final and binding without anything further.

There is no question, Mr. Strong, as I view it—I haven't made an extensive review of any of the authorities, I have had no opportunity to—but there is no question in my mind of the right of a client, either with or without cause, to discharge his counsel when he desires. But when he attempts to do so there are certain obligations that he must meet, because there are certain rights on the part of a lawyer. That is regulated by the nature of the employment. One of which is, for example, that he must pay the fees that may be due to the lawyer. And there are other relationships too that must be taken into account.

Now do you consider that the situation that exists between you and your associates and your counsel is irreconcilable?

MR. STRONG: Again I say to you that I am only a layman. I would much prefer to have the advice of counsel in speaking for this record. I say to you that the action of our previous counsel was the cause of Bell, Farrar and Scott withdrawing from the case. Their stink has brought it about. Consequently, I don't believe that they can file what they filed here in your Court on the 29th, bring about what they have brought about upon us, without a full and exhaustive hearing. And I think that the Court would serve the purpose of justice to exhaustively hear this thing rather than to make it a moot question; that by their trickery of taking this position and filing this petition, as they did, without any notice to the plaintiff or the individuals, bring about the withdrawal of the other counsel that we had, on completely false grounds, as is refuted on the

affidavit and petition four of the members of this Cooperative have filed. I think it is serious, your Honor, and it should be set down for a hearing before this Court.

THE COURT: But I have nothing to be heard, sir. There is nothing in the way of— And you have a right, and will be given time, to consult other counsel if you desire. But, I want to assure you, sir, that you and your associates, so far as it is in my power, will have your rights protected, and at the same time I have an obligation to counsel who are members of the Bar of this Court, to see that their rights too are not violated.

MR. STRONG: That is correct.

THE COURT: And I think time can be granted to allow you time to employ counsel, if that is what you desire to do, to have representation in the Court, have a spokesman for yourself.

MR. STRONG: That is correct.

THE COURT: So far as I am concerned, as soon as you will have formulated anything upon which the Court may act— I have nothing before me now; I have a record that is barren of the appearance of these people. The motion that they have filed, to quash his appearance, is granted in the matter of course on account of withdrawal—it isn't granted as a matter of course; it falls of its own weight.

MR. STRONG: May I ask your Honor: There is a request in that petition of ours requesting a postponement of the commencement of depositions to be commenced on September 6.

THE COURT: That is the next question that I was going to discuss with you. That is the reason that I suggested perhaps your departure should not be so sudden. Those depositions are to be resumed, as I understand, at Davenport on Tuesday the 6th.

MR. STRONG: That is correct.

THE COURT: Evidently, even though you and your counsel might ultimately find it in the interest of both of you that you go along together, at the present stage of the proceeding you are not prepared to go ahead without prejudice to your

own rights. And I think the Court, of its own motion, should continue those proceedings to a date later to be determined. Normally I have declined to interfere with the action of the Master, feeling that it is his duty, since he was appointed for that sole purpose, to make those determinations. But in the circumstances, as I did once before, I shall continue those hearings to a date later to be determined, and I will ask the Clerk to give notice to all counsel of record and to ask the Master to notify the Commissioner that the taking of the deposition of Mr. Strong, which was suspended, will be continued to a date later to be determined.

Now I will confess that I want to lend my offices in any way I can to bring about as harmonious a result as may be possible in respect of all of those here involved, clients and counsel. But I have nothing before me at the present time.

I will be very glad to hear any suggestion from Mr. McManus.

MR. McMANUS: The only suggestion that I have to make, your Honor, is this: I got over here about 10 minutes of 2 this afternoon and I learned for the first time of the filing of the paper which I am told was denominated Petition of Intervention, which I have not yet had opportunity to read. Apparently, from what my associates tell me, it is a scurrilous attack upon counsel for the plaintiffs of record in this lawsuit.

I would like to make the professional statement, your Honor, that prior to the time the entry of the appearance was filed in the office of the Clerk of this Court by the law firm of Bell, Farrar and Scott of Rock Island, Illinois, none of the plaintiffs had ever discussed with me the necessity or advisability or intention to employ other counsel, or that they consulted with them. So that the filing of that appearance by those lawyers was a complete surprise to me.

Subsequent events have been rather surprising too, so that I am unable to definitely state what position we are going to take at this time, except to suggest to the Court that we will take whatever steps we deem advisable and necessary to protect our rights and our interests, and to assure this Court that at all times in every way, at every stage of this law suit, all counsel for the plaintiff have conducted themselves in accordance with the highest standards and ethics of the legal profession.

THE COURT: Well, I may say to counsel that so far as anything has come to my attention, it has indicated only such course of conduct on your part. However, I repeat, there does exist a right on the part of a litigant to discharge counsel with or without cause, but, when that is attempted, of course, certain obligations may arise because of duties that may be owed to the counsel.

In the present state of the record there is nothing before the Court upon which the Court can act. When there is anything upon which I can act, after you have had an opportunity to seek advice, sir, I will set it down as promptly as possible. It happens that the only date that I presently have open is September 8. All of the days of the next week are occupied except the 8th. On the 12th I go to Davenport to open a two weeks' term there, and I will be there during that period. If the matter is ready during that period I may be able to give it attention there, because I assume it could be set down on shorter notice.

Following that we open on the 26th at Creston, where I have a full docket, apparently; and on October 3 at Council Bluffs; and again on October 17 at Ottumwa. So our docket will be rather full. We are making the rounds of the various divisions.

But I will try to accommodate myself to the convenience of counsel and clients and take care of the matter as promptly as possible.

Do you think of anything else, sir, that could be suggested at this time?

MR. STRONG: I am sure, your Honor, that we will make every effort to get counsel as rapidly as possible and advise the Court as soon as we have concluded it.

THE COURT: I want to make it clear to you that in suggesting to you that you are given this opportunity to seek advice and legal assistance, I am not in any way ruling upon the effectiveness of your attempted discharge of your counsel.

MR. STRONG: I understand that, your Honor.

THE COURT: Very well.

Do you have anything further, Mr. McManus?

MR. McMANUS: Just this suggestion, that the Court take judicial notice that there is not now on file or pending in this Court any motion to substitute counsel, and that we are still counsel of record for plaintiffs in this case.

THE COURT: Well, the Court will naturally take judicial notice of its own records.

September 2, 1955

Filed motion of Bell, Farrar & Scott to withdraw appearance. (R. 40)

September 2, 1955

Notice given by Clerk to Wayne G. Cook, Special Master, by telephone and to all attorneys of record, by mail, that Court continued date to resume taking of depositions at Davenport, to a date later to be determined.

September 3, 1955

Filed order continuing taking of deposition of Harry J. Strong to a date later to be determined and announced, Riley, J. (Notice given to Special Master Cook and to all counsel of record.)

September 6, 1955

Entered order that withdrawal of appearance of Bell, Farrar & Scott is accepted; and that petition to intervene shall not be filed, Riley, J. (Copies mailed to Bell, Farrar & Scott; Harry J. Strong, McManus, Shepherd, Nady and all attorneys of record.) (R. 41)

September 15, 1955

Filed order to resume taking of the deposition of Harry J. Strong at 725 Davenport Bank Bldg., Davenport, Iowa, at 10:30 a.m. on October 3, 1955, Riley, J. (Notice to all counsel and to Harry J. Strong.) (Said order is set out below:)

At the hearing at Des Moines, Iowa, on Sept. 2, 1955, in this matter, the Court on its own initiative, but on behalf of plaintiffs, continued to a date later to be determined the deposition of Harry J. Strong, then ordered by Wayne G. Cook, special master, to have been resumed on Sept. 6, 1955.

Because of the summary order of Sept. 2, 1955, of this court and of defendants' right to proceed with the taking of such deposition and for other good cause appearing:

IT IS ORDERED, That the deposition of Harry J. Strong shall be resumed at Room 725, Davenport Bank Building, Davenport, Iowa, at 10:30 a.m., on Monday, October 3, 1955, and that notice to all parties concerned shall be given by mailing a copy of this order to the witness and plaintiff, Harry J. Strong, and to all counsel of record.

September 16, 1955

Filed motion for leave to remove France, France & Nady and James R. McManus and Allan R. Shepherd as attorneys for plaintiffs herein. (Copies mailed only to James D. France, X. C. Nady, James R. McManus and Allan R. Shepherd.) (R. 41)

September 21, 1955

Filed letter of Wayne G. Cook dated September 21, 1955, to Hon. Wm. F. Riley, Judge, tendering his resignation as Special Master.

September 21, 1955

Filed Order accepting resignation of Wayne G. Cook as Special Master, Riley, J. (Copies mailed to all counsel, the individual plaintiffs, First Iowa Hydro Electric Cooperative, Wayne G. Cook and Edward A. Doerr on September 22, 1955.) (R. 48)

September 21, 1955

Order appointing Edward A. Doerr as Special Master, and that $2500.00 shall be paid by plaintiffs and $2500.00 by defend-

ants into the Registry of the Court for allowance of fees and disbursements of Special Master, Riley, J. (Copies mailed to all counsel, the individual plaintiffs, First Iowa Hydro-Electric Cooperative, Wayne G. Cook and Edward A. Doerr on September 22, 1955.) (R. 48)

September 26, 1955

Filed Plaintiffs' Motion to defer deposit of funds. (R. 50)

September 27, 1955

Entered order denying motion to defer requirement of deposit and deposit of $2500.00 be made forthwith, Riley, J. (Notice mailed to Edward A. Doerr, X. C. Nady, J. R. McManus and Harry J. Strong.) (R. 52)

September 28, 1955

Filed order continuing taking of depositions to October 10, 1955, at 11:00 a.m., Edward A. Doerr, Special Master. (Copies mailed to all attorneys of record, all plaintiffs and Michael T. Organ, Commission.) (Said order is set out below:)

This order is made by the Special Master on the informal application for a delay submitted to him by plaintiff Harry J. Strong.

The taking of depositions pursuant to rules 28 and 30 of the Rules of Civil Procedure and prior orders in this matter was formerly scheduled to be resumed at 10:30 o'clock a.m. on October 3rd, 1955. The taking of such depositions is continued so as to be resumed, in lieu of the above stated time, at 11:00 o'clock a.m. on October 10th, 1955.

September 29, 1955

Received check of Lane & Waterman for $2500.00 and deposited in the Registry of the Court at Des Moines, Iowa, paid on behalf of defendants in accordance with order dated September 21, 1955.

September 29, 1955

Filed order that motion of plaintiffs entitled "Motion for Leave to remove attorneys for plaintiffs herein" shall be heard on October 3, 1955, at 2:00 p.m. in the Petit Jury Room, Federal Building, Davenport, Iowa, Edward A. Doerr, Special Master. (Copies mailed to all counsel and all plaintiffs) (R. 53)

September 29, 1955

Filed Resistance of France, France & Nady, James R. McManus and Allan R. Shepherd to motion to remove attorneys and application by attorneys for affirmative relief, with proof of service. (R. 54)

September 29, 1955

Filed order that first meeting of attorneys for all parties shall be held with the Special Master at Room 725 Davenport Bank Building, Davenport, Iowa, on October 10, 1955, at 10:30 a.m., Edward A. Doerr, Special Master. (Copies mailed to all counsel and all plaintiffs.)

September 30, 1955

Filed motion of Seth Gooder, Joseph P. Condon and Lloyd Drexler for leave to intervene with proof of service. (R. 64)

October 3, 1955

Filed order for submission of motion for leave to intervene on written statements to be furnished by October 12, 1955, Edward A. Doerr, Special Master. (Copies mailed to all counsel and all plaintiffs and to attorneys for intervenors.)

October 3, 1955

(Abstract of Proceedings before Special Master Doerr on motion of the plaintiffs to remove Attorneys France, France & Nady, James R. McManus and Allan R. Shepherd.)

At 2:00 p.m., Monday, October 3, 1955, the hearing was convened and proceeded as follows:

THE SPECIAL MASTER: The hour of 2 o'clock is at hand. We will consider ourselves convened. Mr. Reporter, will you let the record show that this hearing convened in the Petit Jury Room at the Federal Building in Davenport, Iowa at 2 o'clock p.m. on this 3rd day of October, 1955, and was immediately adjourned to reconvene in the Grand Jury Room, and did so reconvene.

I have some news which will be of interest to you. I received a telephone call from the plaintiff, Mr. Harry Strong, this morning. He told me that he had taken proceedings in the Circuit Court of Appeals for an injunction and stay order, the further particulars of which I am not familiar with, at all. He said that neither he nor any of the plaintiffs would attend the meeting this afternoon. I told him that I took note of the fact. In the absence of any more precise information, we will proceed with this hearing. Are any of the plaintiffs here, or represented by counsel?

MR. McMANUS: Your Honor, I might say that France, France & Nady, and James R. McManus, and Allan R. Shepherd are here in person, and we are the attorneys of record in this case, for the plaintiffs.

THE SPECIAL MASTER: We will take note of that, Mr. McManus. According to the order setting this hearing, the plaintiffs were given the privilege to be represented by counsel of their own choosing, so aside from James R. McManus and Mr. Shepherd, and France, France & Nady, I take it the plaintiffs are neither here nor represented by counsel. The other appearances, Mr. McManus—

MR. McMANUS: (Interposing) Now just a minute, Your Honor. If I may suggest, I think the record should affirmatively show that at this time the plaintiffs are neither here in person, nor are they represented by counsel, other than those that I named, and I ask that the record may so show.

THE SPECIAL MASTER: The record will so show. The other appearances, Mr. McManus, you appear for yourselves, I take it.

MR. McMANUS: Yes, we appear in person, as I said, for ourselves.

THE SPECIAL MASTER: Do you wish to make any opening statement, Mr. McManus?

MR. McMANUS: I think that in view of the entire situation, and with all due deference to Judge Riley and to the Special Master, that I should say that, for the purpose of the record and for the purpose of preserving the rights and interests of ourselves as attorneys, and the plaintiffs also, I am entirely unaware of what proceedings the plaintiffs individually and personally, or through other counsel, may have taken or filed in this case, but I do want to object and protest against a hearing being conducted before the Special Master at this time, for the reason that the order made by Judge Riley on September 21, 1955 appointing the Special Master, among other things, deprived the plaintiffs of their right to a trial by a jury as guaranteed to them in a suit of this kind wherein a jury has heretofore been demanded, in violation of the rights guaranteed them by the 7th Amendment to the Constitution of the United States, and denies to them due process of law as guaranteed to them by the provisions of the 5th Amendment to the Constitution of the United States. And in view of that fact we, as attorneys—and I refer to France, France & Nady and James R. McManus and Allan R. Shepherd—we have an interest in this controversy, both by reason of the terms of our employment and the Federal cases, because of the contingent character of the arrangement for compensation, should raise that question in our own behalves also, and we do raise that question and take the view that the order made by Judge Riley on September 21, 1955 was void because it was in contravention to the rights and interests of both the plaintiffs and their attorneys of record, under the 5th Amendment and the 7th Amendment to the Constitution of the United States.

THE SPECIAL MASTER: There are some argumentative answers to the objection, but argument would be out of place. The objection, if good, would also appear to be premature. But I will make the short answer that the objection is overruled.

MR. McMANUS: Very well.

Now do you want to note any other appearances, Your Honor?

THE SPECIAL MASTER: The other appearances are by counsel present as observers only, by the limitations of the order. If you would like to have the other appearances noted, I would be very glad to have it done.

MR. McMANUS: I think they should be, Your Honor.

Thereupon it was made to appear the one or more of the attorneys representing the corporate defendants were present as observers but took no part in the proceedings.

Also present were Arthur G. Field of Chicago, Illinois, attorney for the Intervenors Seth N. Gooder, Joseph P. Condon and Lloyd Drexler on their motion filed September 30, 1955; Jake More, Harlan, Iowa; and Joseph P. Condon and Seth N. Gooder of Chicago, Illinois.

Plaintiffs' attorneys of record called the following witnesses, who, being sworn, testified:

Joseph P. Condon

My name is Joseph P. Condon, 208 South LaSalleStreet, Chicago, Illinois. The name of my company is McDougal & Condon, Inc., same address. I have been acquainted for many years with the project on Cedar River sometimes referred to as the Moscow Dam and I have been acquainted with Harry J. Strong of Davenport, Iowa for 14 or 15 years. I have had financial dealings with the First Iowa Hydro Electric Cooperative to the tune of about $85,000, meaning that I have advanced to that Cooperative approximately that sum, for the purpose of furthering the project, its aims and purposes.

I had a conference with Mr. Strong in my Chicago offices on July 25, 1955. He was with Jake More of Harlan, Iowa. Mr. Seth Gooder and Mr. Kelly were also there. Mr. Strong said that he wanted to raise a fund of money to further the litigation in the Iowa Hydro Electric project, the suit pending in this Court as Civil No. 1-224. He wanted to raise $25,000 to show that he had money to pay for legal fees or litigation to pursue the suit. I gave Mr. More $10,000 for his custody, who later turned it over to Mr. Strong with the understanding that he would raise additional moneys totaling $25,000. I knew Mr. Gooder was going to put in, so Mr. Strong would go back home and get $10,000 from someone in Iowa to make the total of $25,000. At no time was this money to be used for Harry Strong's personal living conditions, and we stipulated that if he did need some personal help or subsistence I would give him additional money other than the money given him this day and this money was solely to be used to pay the lawyers who were handling the litigation, Mr. Nady and Mr. McManus and whoever their associates were. This money was supposed to be held by Mr. More in escrow. Mr. Strong objected to More having the money because he said he was treasurer of the Iowa Hydro Electric and it would insult his honesty and intelligence, or something or other, nevertheless I gave two checks, my check for $5,000 and Lloyd Drexler's check for $5,000, personally to Jake More. Seth Gooder was also to give a check for $5,000. At that time, Mr. Strong was very pleased with his lawyers and expressed satisfaction with the progress of the case. Mr. Strong has never at any time during my association with him and since the commencement of the suit I have mentioned a while ago, expressed any criticism or dissatisfaction with the lawyers that instituted the suit. In fact, I would not have given him the money if there was any disharmony at all. We had the other impression, that everything was harmonious and amicable, and going along fine. Mr. Strong told me that the suit was going along fine and he was satisfied with his lawyers. The first time I actually had known that the plaintiffs were attempting to discharge their attorneys of record was when I came out to Des Moines on September 2, 1955.

I believed Mr. Strong when he told me he wouldn't use any of the $15,000 unless and until the Cooperative had raised an additional $10,000, and I believed him when he represented that he was to use the money only for legal fees. I first be-

came aware that Mr. Strong was using some of this money for his own needs when we came to Des Moines early in September. After a hearing before Judge Riley on September 2, 1955 Mr. Gooder and I went over to the Franklin Hotel to meet with Mr. Strong and the Board. One member was not there. At that time I asked Mr. Strong and the members of the Board and the officers of the Cooperative to return the $15,000. They said they didn't have a full quorum, a full Board, but they would meet on the following Wednesday and send our money back. We wanted to be damn sure they had the money, and Harry Strong told me he had $29,500 in a bank. He didn't tell us what bank it was in, but we were going to get our money back the following Wednesday. I haven't seen Mr. Strong or the money since then. I want the $15,000 that I, Mr. Gooder and Mr. Drexler turned over to Mr. Strong to be deposited in the registry of this Court to be used for the purposes that we intended it to be used and to have the Court impress that fund with a trust, to be paid to the lawyers in the litigation.

Seth N. Gooder

I am Seth N. Gooder, 1247 Deerfield Road, Deerfield, Illinois, a civil engineer. I am President of Gooder Henrichsen Company. I have been interested in the Moscow Dam project for 25 years and have become acquainted with Harry J. Strong, Secretary-Treasurer and General Manager of First Iowa Hydro Electric Cooperative. I was aware of the institution of this action, Civil No. 1-224 in this Court. Over a period of years I have advanced money represented by contract indebtedness and otherwise to First Iowa Hydro-Electric in the approximate amount of possibly $60,000. I saw Harry J. Strong in the offices of McDougal & Condon in Chicago on July 25 or July 26, 1955 and overheard a conversation with Harry J. Strong, the substance of which was that First Iowa needed $25,000 to carry on their litigation. Mr. Condon agreed to put up $5,000, Mr. Drexler $5,000, Mr. Sperry $1,000. I wanted assurance that the balance of the money was subscribed and received before I put up $5,000. The total amount to be raised by First Iowa was $25,000, and that money was to be used solely for this litigation, to be impounded in a special account, and was not to be used for any of Harry Strong's living ex-

penses. On August 1 I sent a check for $5,000 to Harry J. Strong, payable to First Iowa Hydro Electric, after I received advice that the balance of the money to create this fund had been raised. I would not have sent my money if I did not believe the balance of the $25,000 fund had not been raised or if I believed that all of the money would not be utilized for the purpose for which it was originally intended. I believed Harry Strong when he represented that the money would be used solely for the purpose originally intended. The checks made out in Chicago on July 25 were given to Mr. More, who was not to release the checks to Mr. Strong unless the $25,000 was raised. I next saw Mr. Strong on a Sunday in the latter part of August when he came to my home in Deerfield. He said he had in mind to discharge the attorneys so I questioned him about whether he had raised the other $10,000 before he used the money I had mailed to him, and he said that he had raised it. I asked him where the $15,000 or $16,000 was that was raised in Chicago and he told me it was in a bank account in Muscatine. I asked him where the rest of the money was that he raised and he said it was not in that account but was in a safety deposit box in cash in Muscatine, and he said it amounted to $20,000, in addition to the $16,000. I told Mr. Strong I would like to go to Muscatine with him the next day and check the account with him and check the money in the safety deposit box, and Mr. Strong said he would return my $5,000 to me and would mail me a check the next day. I never received the check.

The next time I saw Mr. Strong was at the Court hearing in Des Moines on September 2. After the hearing I went to the Franklin Hotel with Mr. Condon and members of the Board and told them that I felt that the money should be returned and I asked the members of the Board whether they still had the money and they said they did. They said they had $29,500. They said they would take action on the $15,000 on the following Tuesday because one member of the Board was missing. I have never received any part of the $5,000.

* * * * * *

Jake More

My name is Jake More, and I live at Harlan, Iowa, and I have been for many years a lawyer in Iowa. Until recently I was general counsel for First Iowa Hydro Electric Cooperative. I have become acquainted with Harry J. Strong, Secretary-Treasurer and General Manager of the Cooperative. I accompanied him on a trip to Chicago on July 25, 1955 and went with him to the office of McDougal & Condon. My recollection of what transpired then is substantially the same as that to which Mr. Condon and Mr. Gooder testified. I rode back from Chicago with Mr. Strong and told him I felt that the attorneys probably ought to be paid $7,500 to each firm so that they would have money with which to carry on the litigation and take care of their expenses. Mr. Strong thought that was too much and he said he would have no objection to giving each of the firms $5,000, and he said he would do so when he got the money. I met with the Board of First Iowa Hydro Electric Cooperative that night but I didn't tell them that I had two checks for $5,000 in my pocket to save Mr. Strong from embarrassment. On July 30, 1955 I got a telephone call from Harry Strong, who told me he would have the money the next day and that it would be in excess of $30,000. He called me Sunday and said he had the balance of the $25,000. As I recall, he had in excess of $30,000, but he had the additional to make up the $25,000, so I told him I would send the checks with the understanding that $5,000 would go to Nady and France and $5,000 to Mr. McManus. He said he would do that and asked me to mail the checks to Cliff Hakes at Muscatine. I then called Mr. Gooder and told him that Harry had called me and had the balance of the money and Gooder could send his check and he said he would. I mailed to checks I had to Harry Strong on July 31. When he told me he had raised the additional money so as to have the fund of $25,000 on hand I believed him, or I would not have sent him the checks. Prior to the time I mailed these checks to Mr. Strong, he never expressed dissatisfaction with the lawyers that were handling the litigation in Federal Court. He expressed on numerous occasions, either over the telephone or when I would see him, the lawyers were doing a good job and he was satisfied with the work that they were doing, that they were developing a good case. He told me on the train he and one of the attorneys had had a little argument, and an unfortunate incident that both of

them regretted, and the lawyer involved was very sorry about it, but that made no difference, that those things happen, and that had happened, as I understand, some three weeks before we were on the train. But he has always indicated the lawyers were doing a good job, and he was well satisfied with what they were doing.

* * * * *

X. C. Nady

I am X. C. Nady and I live at Tipton, Iowa. I am a member of the firm of France, France & Nady. I have been practicing law in Iowa for 40 years. I am one of the attorneys of record in Civil No. 1-224 pending in this Court. I have been an attorney of record in the litigation since its commencement. I requested permission from the Cooperative to permit James McManus and Allan Shepherd to become associated with my firm in the commencement and prosecution of that suit. They were first contacted by the Cooperative on October 14, 1953. I remember Mr. Strong coming with me to your office, Mr. McManus, in Des Moines in January of 1954. I remember discussing with Mr. Strong then the terms upon which we would accept employment in the litigation. The terms of our employment were that he would not be able to pay us fully as we went along but that he would have sufficient money to maintain us and pay us what was necessary for our office expenses and overhead during the time that we were to spend the greater part of our time to this litigation, and I later entered the meeting where Mr. Strong reported that to the Board, and I think there are minutes in that Board where we were employed on a contingency basis, subject to being paid a reasonable amount as we went along. Thereafter, since our employment, we have discharged our responsibilities to the best of our respective abilities to the plaintiffs in this litigation.

I spent 1,158 hours in 1954 on this litigation, and I would say that a great portion of that time has been in your office in conjunction with briefing and working on your part. I believe we have spent in excess of 80 per cent of our time in 1955 on this litigation. The total amount of time I have spent on this lawsuit since it began would be in excess of 400 days, possibly 450. I have been employed in this litigation 22 or 23 months

altogether. I have a record of our total disbursements, our total out-of-pocket money is in excess of $3,000. This does not include approximately 14,000 miles with our automobile nor compensation for car or anything of that nature. The reasonable value for the use of my car would be 10 cents a mile. Except for Mr. Shepherd's absence from the discovery depositions commencing June 6, to my personal knowledge he has put in approximately the same amount of time that I have in connection with this litigation. While we were taking depositions we called on him numerous times to check various legal holdings and to do research work for us. The disbursements that I mentioned did not include approximately $400 in long distance telephone calls, for which I have not been reimbursed. To my personal knowledge, you, Mr. McManus, have put in approximately the same amount of time that I have in connection with this litigation. You have come to Tipton on several occasions during the last 22 months and spent time there examining books and records of the Cooperative and in doing research work.

I have an opinion as to what would constitute the fair and reasonable value of my services in Iowa during the period I have been engaged as an attorney as compensation for my work on a quantum meruit basis. Considering the responsibility assumed in a case of this size and the various legal problems to be met and the work done, it is my opinion that the services of our firm are worth $100,000.

I heard Mr. More's testimony about raising the balance of the $25,000 fund. I had a conversation in the hotel after the transmittal of the money to Mr. Strong by Mr. More and I told Mr. Strong we felt that now he had gotten the money it should be paid to us since he had got it for that purpose and and that it was actually our money. Mr. Strong stated at that time that he had told Mr. More that he had raised the additional money required as a condition upon his making payment to us, but in fact he had not raised it, and that he had lied to More in getting possession of the money, that is in getting possession of the $10,000 which More sent him July 21. I have never received the $5,000 nor has Mr. France. Mr. Strong just made the blank statement, "I haven't got that money," and I said to him, "Well, didn't you tell Jake that you did have it?" and he said, "Yes, I did, but I didn't have it."

When I said I had spent 400 or 450 days on this litigation I meant that was spent by me alone. It is in excess of that. I have a complete record. I feel I have spent approximately 80 per cent of my time during the last two years, almost, in this action here.

Returning to the conversation between myself, Mr. Strong and you, Mr. McManus, in your office in January, 1954:

"Q. But in that same conversation, after he had spent several days, do you recall me saying this to Mr. Strong, or this in substance, 'In view of the fact that this litigation will be prolonged, you don't have any current assets with which to pay us, I wouldn't want to get into the lawsuit unless I felt that I was protected, and that we lawyers had an interest in the litigation,' or words to that effect?

"A. Yes, I recall that now, Mr. McManus, and I may say at the same time the thing that impressed that upon me was that you related the circumstance where you had been in some labor cases that had been carried on for a considerable length of time, and unless you were sure that you could finally be compensated and have an interest in the case, that you didn't want to get into it.

"Q. And what did he say in response to that statement?

"A. Oh, he said, 'When Jake More and X. here recommends you and tells me you are all right,' he said, 'I have no hesitancy in making you that promise and going along with you on that basis.'

* * * * *

"Q. And that I didn't want in this litigation unless I had an interest in the subject matter of the litigation?

"A. That's right.

"Q. And did he agree to that?

"A. He did.

"* * *

"Q. And with respect to all of the attorneys?

"A. That's right."

James D. France

My name is James D. France, Tipton, Iowa. I am a member of the firm of France, France & Nady. I have spent about 250 days on this litigation from the time of my employment to August 31, 1955. I heard Mr. Nady's testimony, but I personally was not present during those conversations with Harry J. Strong regarding our employment. I think Mr. Nady's estimate of $3,000 out-of-pocket expense is about $500 low. I think our firm has advanced, the two of us, about $3,500. I have an opinion as to the value of Nady's services and my services up to August 31 of this year, considering the amount involved and the responsibility and the amount of time concerned, and that value is $100,000.

I would say that Mr. Shepherd and you, Mr. McManus, have put in approximately the same amount of time as Mr. Nady put in up to the time of the depositions commenced in June of this year. Mr. Shepherd had put in about the same amount of time as Nady up to June 5, and he did some research while discovery procedure was going on. I have an opinion as to the value of Mr. Shepherd's services and your services in Iowa in 1954 and 1955 in connection with this litigation, and that value would be $100,000.

* * * * *

Jake More

I am the same Jake More who testified earlier this afternoon. I have been practicing law in Iowa since June, 1928. General practice, including office and trial work. I heard the testimony of Mr. Nady and Mr. France and am acquainted with those gentlemen and Mr. Shepherd and with you, Mr. McManus. I have been in pretty close contact, almost daily, with all four of you since the litigation began and I am pretty well familiar with the amount of time that the four of you have spent on this lawsuit. I have an opinion as to the reasonable value of the attorneys' services in connection with a litigation of this character in Iowa. Up to August 31, 1955 I was general counsel for First Iowa Hydro Electric Cooperative. In my opinion the fair and reasonable value of the services rendered by France, France & Nady from the commencement of this lawsuit down to August 31, 1955 would be $100,000. I have knowledge with respect to the time Mr. Shepherd and you

have put in on this lawsuit since its inception and I have an opinion as to what would represent the fair and reasonable value of your services in 1954 and 1955 and that figure would be $100,000. From my knowledge and observation and experience, I have an opinion as to whether or not at all times during this litigation the lawyers of record for the plaintiffs have conducted themselves properly in attempting to look after the lawsuit to the best of their ability. Since before this case was filed at least one of the four gentlemen that you have referred to have consulted with me weekly, almost weekly, and sometimes several times each week, on many occasions several times each day, and I know that since the case was filed that the four lawyers involved have spent a greater part, and many weeks and sometimes months all of their time in the prosecution of this case, and I have from time to time talked to the officers and directors of the First Iowa Hydro Electric Cooperative with respect to whether or not they are satisfied with the services of their attorneys of record, and they have told me that the services were satisfactory.

* * * * *

Ralph U. Heninger

My name is Ralph U. Heninger and I have been practicing law in Iowa since October, 1932. I am a member of the firm of Betty, Neuman, Heninger & Van Der Kamp in Davenport. I am familiar with the fair and reasonable value of attorneys' services for office and court work in Iowa. I know both you and Mr. Shepherd. I practiced in Des Moines for about six years before coming to Davenport. I know Mr. Nady and Mr. France. I have heard their testimony. The fact that this is an anti-trust suit under the Clayton and Sherman Acts, and the amount involved, would influence and affect my judgment with respect to fees of lawyers involved in such a lawsuit as well as the responsibility of those charged with looking after it.

I would say the fair and reasonable value of the services of Mr. France and Mr. Nady on the basis of this case would be a minimum of $150 a day up to $200 a day for services performed by each of them in active work on the case. I would say the charge would be the same whether it was court work or office work.

* * * * *

Allan R. Shepherd

My name is Allan R. Shepherd and I live in Des Moines, Iowa. I have heard the testimony given by Mr. Nady and Mr. France about the time the four of us spent in connection with this litigation, and my testimony would be substantially the same with respect to the amount of time each of us has put in on the case since we were employed, down to August 31, 1955. I believe I have put in about 30 days less than Mr. Nady has, but during that 30 days I also did some research and briefing, although I wouldn't have any accurate record as to how much time that was.

Referring to January, 1954 when Mr. Strong was in our office negotiating and attempting to get us into the lawsuit, you insisted that we must have some assurance that we would not be deserted until we had a chance to carry this to a successful conclusion, but we recognized, of course, that our client would have the ultimate control of any settlement and he would be bound, of course, by your advice. I think that's the gist of it. I recall that you warned Mr. Strong that we must have an interest, but that it would be subject to his rights, subject to his overriding control in the event of settlement. I mean plaintiff's overriding control. I speak of him because he was the most active of our clients.

"Q. And when I told Mr. Strong of my previous experience and that it would be necessary that we have an interest in the litigation to insure our payment, subject to the paramount right of the plaintiffs to control any settlement, what did Mr. Strong say in that connection, in substance?

"A. He assured us that we would be protected; that he and his counsel, general counsel, Mr. More, would always respect our rights.

"Q. And did he say that the suggestion I made would be agreeable to him?

"A. That's right.

"Q. And have we proceeded and acted in that manner?

"A. We have."

We have out-of-pocket expenses amounting to several hundred dollars for which we have never been reimbursed and we have received no part of the $5,000 that was to be paid to us out of the $25,000 trust fund. I believe that the opinion of Mr. France and Mr. Nady with respect to our total fee is a fair estimate.

Following the conclusion of the testimony there was a colloquy between Special Master Doerr and Attorney McManus and the Special Master announced his intention to sustain the motion to discharge counsel, indicating that in his judgment the plaintiffs had the privilege of discharging their attorneys, regardless of fault and regardless of the contingent nature of the employment, but that said privilege and right was subject to conditions, and then stated:

> "That order will, however, be conditioned. The condition will be the payment to James R. McManus and Allan R. Shepherd jointly the sum of $100,000 as fees, and upon the payment to James D. France and Xavier C. Nady of the sum of $100,000 for fees.
>
> "There will be a condition to that condition, however. In view of the relationship of trust and confidence between attorney and client I will order that the matter can be reopened upon the application of the plaintiffs for the sole purpose of showing their inability to comply, in whole or in part, with the condition for the payment of the $200,000 total sum. That will be the substance of the order, and of course copies will be transmitted to the interested parties."

The Special Master then stated that he proposed to enter a formal order, and the hearing was thereupon adjourned.

October 5, 1955

Filed Order re Motion of Plaintiffs for leave to remove France, France & Nady and James R. McManus and Allen H. Shepherd as attorneys for plaintiff herein and re resistance to motion to remove attorneys and application by attorneys for affirmative relief, Edward A. Doerr, Special Master (Copies mailed to all plaintiffs and all counsel). (R. 70)

October 5, 1955

Filed opinion of Edward A. Doerr, Special Master, re October 3, 1955 hearing (Copies mailed to all plaintiffs and all counsel). (R. 72)

October 5, 1955

Filed Order that plaintiffs may submit written statements re Motion for Leave to Intervene by October 12, 1955, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel). (R. 76)

October 6, 1955

Filed Order filed on Oct. 3, 1955, in the U. S. Court of Appeals for the Eighth Circuit denying motion for leave to file petition for mandamus and injunction for want of jurisdiction. (R. 77)

October 10, 1955

Filed affidavit of prejudice by Harry J. Strong against Riley, J. (R. 78)

October 10, 1955

(Abstract of proceeding before Special Master re deposition of Harry J. Strong.)

At 10:30 o'clock a.m., on October 10, 1955, Mr. Nady and Mr. McManus appearing for plaintiffs of record, and all of the defendants appearing by one or more of their attorneys of record, the following proceedings were had before Edward A. Doerr, Special Master.

Master Edward A. Doerr, presiding, stated that the meeting was called in advance of the resumption of discovery depositions at 11:00 a.m., for the purpose of complying with the rules, getting acquainted and ascertaining how to speed up the proceedings. No objections were made by plaintiffs or their attorneys of record to the proceeding before the Special Master at this time. Tr. 1920-1928)

The meeting was recessed until 11:00 a.m. and was then reconvened, when the following proceedings were had:

"THE MASTER: Gentlemen, I consider that we are convened.

Has it been the practice after adjournment to recite the entry of appearances again?

MR. WALKER: We have not been doing that.

THE MASTER: I do not see any reason for it unless someone wants it.

MR. STRONG: I think a roll call would be in order.

THE MASTER: Mr. Strong has asked that a roll call be made of all appearances. We will do it. We will start immediately on the Reporter's left." (Tr. 1929)

The roll call disclosed that one or more of the attorneys of record for all defendants were present. (Mr. X. C. Nady and Mr. J. R. McManus announced their appearance as attorneys of record for the plaintiffs. (Tr. 1930-1931)

In addition to the parties and attorneys present before the Master, Mr. A. L. Elston, of Rock Island, Mr. Glenn Elston, of Rock Island, and Richard Hoyt, of Davenport, were also present as interested observers.

THE MASTER: If there is nothing else, then, we will then resume with the taking of the deposition of Mr. Harry J. Strong, one of the Plaintiffs.

"MR. STRONG: Mr. Master, I am Harry J. Strong, Plaintiff, the witness called in this deposition.

I am here unrepresented by counsel.

The Court has been on notice since September 2nd, that we have discharged our counsel.

The Court has seen fit to freeze us in that position, and under those circumstances, and without counsel, I am going to decline to testify further.

I want the record to show that there was filed in the Court this morning at 9:35 A. M., an affidavit of prejudice.

I wish the record to further show that we request that any further action in this case be deferred until that matter is disposed of.

THE MASTER: There are argumentative answers to what you have asserted, Mr. Strong, but this is not the time for argument.

MR. STRONG: I shall leave the Court room to refuse to testify without counsel. (Tr. 1934)

"THE MASTER: I advise you to testify.

MR. STRONG: And I shall decline.

THE MASTER: I urge you for your own good to testify. You may be held in contempt for refusal to testify.

MR. McMANUS: Let the record show that J. R. McManus and X. C. Nady, attorneys of record for the Plaintiffs in this proceeding are here and ready to proceed.

MR. LARNED WATERMAN: Before Mr. Strong leaves the room, he should be advised that—

MR. MARKMAN: Let the record show that at this moment Harry J. Strong has walked out of the room.

MR. LARNED WATERMAN: I will complete the advice which was directed to Mr. Strong, and which he declined to hear by arbitrarily leaving the room, that one of the Defendants, Iowa-Illinois Gas and Electric Company, shall seek the sanctions permitted by Rule 37 as soon as motions can be properly prepared to be submitted to the Special Master.

MR. McMANUS: That may be part of the strategy, I do not know. (Tr. 1935)

"MR. WALKER: In view of the circumstances, Mr. Doerr, the fact that we no longer have a witness at this point, I am wondering if you have suggestions as to how we might proceed?

Now, I might say at the outset that in addition to Mr. Strong being cited for or noted for deposition, all of the other Plaintiffs have been noted by the Defendant Union Electric Power Company.

Assuming that we are not going to be able to get Mr. Strong in here at this time, I would assume that it might be in order for you to give consideration to summary notice to some of the other Plaintiffs for the taking of their depositions, pending what other action might be taken by the Defendants as the result of Mr. Strong's most recent action.

MR. LARNED WATERMAN: Before going further, Mr. Doerr, I would like the record to show that both of the Messrs. Elston who noted their presence as observers are still in the room, having not left with the witness, Harry J. Strong. Mr. Honts has, however, left.

THE MASTER: That will be noted. (Tr. 1936)

"MR. WALKER: May I suggest, Mr. Doerr, in light of the developments this morning, that it might be well for us to adjourn at this time until 2:00 o'clock this afternoon to give the defense counsel an opportunity to discuss the developments and determine what action we would prefer to take.

THE MASTER: I believe a recess would be in order. We will recess until 2:00 o'clock this afternoon." (Tr. 1937)

The proceedings before the master reconvened at 2:00 o'clock p. m.

No objection was made by plaintiffs or their attorneys to the appointment of the Special Master or the order of reference of September 21, 1955, at the hearing on October 10. At 2:00 p.m. that same day the hearing reconvened before the Special Master. The appearances for plaintiffs and defendants were noted as being the same as at the morning session. Strong remained absent. After discussion, the proceedings were again adjourned until 5:00 p.m. on the same day, at which time the following proceedings were had:

The motion of the defendants to dismiss was presented to the Master and service thereof acknowledged by Mr. McManus, as attorneys for plaintiffs, the same being the motions to dismiss filed with the clerk on October 11, 1955, by the defendant Union Electric Power Company and joined in by the other defendants. Mr. McManus on behalf of plaintiffs requested sufficient time to resist the motion to dismiss, and following a general discussion with reference to the time and place of hearing thereon it was agreed the matter might be set for hearing on Friday, October 21, 1955, at 11:00 p.m., in Davenport, Iowa, at Room 725 of the Davenport Bank Building. (TR. 1944-1955)

Following a further discussion the hearings that day were concluded by the statement of the Master of record as follows:

> "THE MASTER: Let the record show that following the filing of a motion to dismiss by the defendants, the Master announced that in consequence of the failure and the refusal of the Plaintiff Strong, to testify, and in consequence of his leaving the hearing room, the taking of his deposition necessarily recessed to be continued, if at all, after ruling on the motion to dismiss, and the affidavit of prejudice so far as ruling on that is within the function of the Special Master." (Tr. 1957)

October 10, 1955

Filed with Special Master motion of defendant Union Electric Power Co. to dismiss and joinder by other defendants, and affidavit of service. (Filed with Clerk October 11, 1955.) (R. 82)

October 11, 1955

Filed amendment to order of October 5, 1955, adding "Defendants took no part in the hearing which was ex parte as to them." Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel.) (R.86)

October 11, 1955

Filed order that motion to dismiss shall be heard on October 21, 1955, at 11:00 a.m., Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel.)

October 13, 1955

Filed order that motion for leave to intervene is denied, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, all counsel and counsel for intervenors.) (Said order is set out below.)

Reference is made to the orders dated October 3rd, 1955, and October 5th, 1955, providing for the submission, upon brief, written statements by counsel, of the MOTION FOR LEAVE TO INTERVENE filed by Seth Gooder, Joseph P. Condon and Lloyd Drexler. Statement has been filed by defendants in opposition to the motion. No statement has been filed by movants or by plaintiffs. The time fixed for submission of such statements has expired.

It appears from the motion and the proposed COMPLAINT OF INTERVENTION attached thereto that the motion does not come within the terms of the governing rule, being rule 24 of the Federal Rules of Civil Procedure.

The MOTION FOR LEAVE TO INTERVENE is therefore denied.

October 14, 1955

Filed order for hearing on Affidavit of Prejudice at Des Moines, Iowa, on Friday, October 21, 1955, at 2:00 p.m., Riley, J. (Copies mailed to all plaintiffs and their attorneys of record.)

October 17, 1955

Filed order changing date for hearing on Motion to Dismiss to October 28, 1955, at 11:00 a.m., at 725 Davenport Bank Building, Davenport, Iowa, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel.)

October 17, 1955

Filed motion by plaintiffs entitled Motion to Expunge a Document Called Deposition of Harry J. Strong. (Said motion is set out below.)

Now comes FIRST IOWA HYDRO ELECTRIC COOPERATIVE, a corporation, HARRY J. STRONG, HARRY IMEL, FRANK A. E. GILLMOR, P. H. NABER and CARL J. MITZNER, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice-President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That a certain document called "Deposition of Harry J. Strong" is a document of 32 volumes and now containing 1957 pages of reported testimony and Court action; that the entire document "Deposition of Harry J. Strong" is a document taken in Open Court and under the rules of Open Court of United States Courts.

8. That in the reported transcription of said document, "Deposition of Harry J. Strong," taken by Eulass & Company, Court Reporters, 54 West Randolph Street, Chicago, Illinois,

there are a minimum of three instances where one of the attorneys for the defendants makes the statement "This is off the record," which follows in the transcribed copies (here follows discussion off the record); that the instances of the off the record discussions are out of the presence of the plaintiffs of this action; that the document, "Deposition of Harry J. Strong," because of discussions off the record which are unreported, is not a true and correct copy of all proceedings in this matter.

WHEREFORE, plaintiffs pray that a document, "Deposition of Harry J. Strong," be expunged from the record.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By HARRY J. STRONG,
Its Secretary-Treasurer.
F. A. E. GILLMOR,
CARL J. MITZNER,
HARRY J. STRONG,
HARRY IMEL,
P. H. NABER,
Plaintiffs.

October 17, 1955

Filed motion by plaintiffs entitled Motion to Expunge From the Record Order Dated October 5, 1955, said Order Pertaining to a Hearing on October 3, 1955. (R. 86)

October 17, 1955

Filed motion by plaintiffs entitled Motion to Expunge From the Record an Order Dated October 11, 1955, and Order Pertaining to Motions to Dismiss and Hearing on Affidavit of Prejudice. (Said motion is set out below.)

Now comes FIRST IOWA HYDRO ELECTRIC COOPERATIVE, a corporation, HARRY J. STRONG, HARRY IMEL, FRANK A. E. GILLMOR, P. H. NABER and CARL J. MITZ-

NER, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice-President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That said Order should be stricken from the record, because on October 10th, 1955, plaintiff, Harry J. Strong, filed an Affidavit of Prejudice with the Court; that said Affidavit of Prejudice was addressed to the Clerk of the Court.

8. That the Court had no jurisdiction in this matter after the filing of said Affidavit of Prejudice at 9:35 a.m. on said October 10th until the Court had acted upon the Affidavit of Prejudice.

9. That the Order of October 11th, 1955, was issued after the filing of the Affidavit of Prejudice, but before the Court had acted on said Affidavit of Prejudice.

10. That a second part of said Order October 11, 1955, pertains to a hearing on the Affidavit of Prejudice; that an Affidavit of Prejudice is not a Motion or a Complaint before the Court, but a mere fact—an affidavit.

11. That an Affidavit of Prejudice is an affidavit filed as a matter of right. That the only one allowed to do anything on an Affidavit of Prejudice is the United States Judge who is allowed to examine it as to form, and the Clerk who is to carry out its direction.

12 That there is no precedent at law for any hearing on said Affidavit of Prejudice; that said Order is in error in ordering a hearing.

13. That said Order is not an Order of the Court, but is in reality, an Order of the defense counsel as may be more clearly found by reading completely Volume 32 of a document called "Deposition of Harry J. Strong" wherein the defense counsel designated the thought in the Order, and the Master merely signed the Order.

WHEREFORE, plaintiffs pray that the aforesaid Order of October 11, 1955, be expunged from the record.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By HARRY J. STRONG,
Its Secretary-Treasurer.
F. A. E. GILLMOR,
CARL J. MITZNER,
HARRY J. STRONG,
HARRY IMEL,
P. H. NABER,

October 17, 1955

Filed motion of plaintiffs entitled Motion to Expunge an Order of Judge William F. Riley dated October 14, 1955, in Reference to Affidavit of Prejudice. (Said motion is set out below.)

Now comes FIRST IOWA HYDRO ELECTRIC COOPERATIVE, a corporation, HARRY J. STRONG, HARRY IMEL, FRANK A. E. GILLMOR, P. H. NABER and CARL J. MITZNER, individual plaintiffs in this action, the individual plain-

tiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice-President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That said Order is contrary to the law as established by the United States Courts in Affidavits of Prejudice, and more particularly that law as laid down in Berger v. U.S.; 255 US 22.

WHEREFORE plaintiffs pray that said Order be expunged from the record and that the Court comply with the dictates of the Supreme Court of the United States as outlined in Berger v. U.S.; 255 US 22.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By: s/ HARRY J. STRONG,
Its Secretary-Treasurer.
F. A. E. GILLMOR,
CARL J. MITZNER,
HARRY J. STRONG,
HARRY IMEL,
P. H. NABER.

October 17, 1955

Filed plaintiffs' Resistance to defendants' Motion to Dismiss and Application by plaintiffs for Affirmative Relief. (R. 89)

The Resistance was 14 legal pages long and attached thereto were 110 legal pages of exhibits which included among other things:

(a) Copy of motion by plaintiffs in the Court of Appeals for the Eighth Circuit for Leave to File Petition for Mandamus and Injunction and for Temporary Order Staying Proceedings (denied by said Court on October 3, 1955. R. 77);

(b) Copy of Petition for Writ of Mandamus and for Injunction and for Temporary Order Staying Proceedings, filed by all plaintiffs and verified by all individual plaintiffs, October 2, 1955 at Davenport, Scott County, Iowa, and Exhibits "A" through "U" and "1" through "4" attached thereto. Exhibit "D" attached thereto was entitled "Petition to intervene on rule to show cause on the motion of attorneys France, France & Nady and J. R. McManus and Allan R. Shepherd to quash the entry of appearance of the law firm of Bell, Farrar and Scott."

Paragraph 9 of said Petition for Writ of Mandamus alleged as follows:

"That in the month of August, 1955 all of your petitioners in Civil suit No. 1-224 before the United States District Court, Southern District of Iowa, Davenport Division, lost faith in their counsel of record."

Paragraph 28 of said Petition for Writ of Mandamus alleged as follows:

"That on the 30th day of September, A.D. 1955, in the afternoon thereof, your petitioners received through the mail, a copy of an Order from the Special Master setting a hearing on plaintiffs' Motion to remove the attorneys of record, Exhibit "H", said hearing being set for 2:00 o'clock P.M. October 3, 1955 and granting the privilege to the defendants in Civil action No. 1-224 to be

present for said hearing, a copy of this Order being attached hereto and made a part hereof and hereinafter referred to as Exhibit "R"."

Paragraph 46 of said Petition for Writ of Mandamus alleged as follows:

"That your petitioners have consistently attempted to work out the differences to allow a fast conclusion of this matter and in fact did hire an attorney to talk with the United States District Judge involved and that he was instructed by your petitioners that he had the power to work out any solution with the attorneys other than giving way the cause of action to the attorneys; that it was reported back by said attorney that the differences seemed irreconcilable and that it was upon the suggestion of this attorney that the Motion to Remove Counsel was prepared and submitted to the Court, Exhibit "H"; that your petitioners have constantly requested acts of the Court which they felt would protect their rights, but in all instances have been turned down as will be more clearly found in exhibits;"

Exhibit "I" attached to said Petition for Mandamus is as follows:

September 19, 1955

Hon. Wm. F. Riley
U. S. District Judge
U. S. Court House
Davenport, Iowa

Re: First Iowa Hydro Electric Cooperative, et al,

vs: Iowa-Illinois Gas & Electric Co., et al

Dear Sir:

Please be advised that the plaintiffs have filed a motion in the above entitled case asking leave to remove FRANCE, FRANCE & NADY and James R. McManus and ALLAN SHEPHERD as attorneys of record for the plaintiffs. In view of the fact that this Court had ordered the depositions to continue on October 3, 1955, the plaintiffs would like to have this motion disposed of as soon as possible.

The plaintiffs are not represented by counsel in this matter and notice of the hearing of this motion will have to be served upon the plaintiffs individually.

Very truly yours,

HARRY J. STRONG
Secy-treas. 1st Iowa
Hydro Electric Cooperative
1011 East High
Davenport, Iowa

Exhibit "J" attached to said Petition for Mandamus is as follows:

United States District Court
for the
Southern District of Iowa
Des Moines 9, Iowa

At Davenport, Iowa
Sept. 20, 1955

William F. Riley
Judge

Harry J. Strong,
Secretary-Treasurer,
1st Iowa Hydro Electric
Cooperative,
1011 East High,
Davenport, Iowa

Dear Sir:

I have your letter of Sept. 19th, asking for an early assignment of your motion for leave to remove counsel. (which I received Saturday).

Present commitments require our presence in Des Moines, on Thursday and Friday. Our Creston, Council Bluffs, Ottumwa and Des Moines terms follow each other beginning next Monday, Sept. 26th. At the first opportunity when notice can be given, the matter will be set.

If you contemplate any action concerning your deposition now scheduled for resumption at Davenport on Oct. 3d, it will be handled through the master.

Very truly yours,

/s/ W. F. Riley
U. S. District Judge.

cc:

F. A. E. Gillmor
Carl J. Mitzner
P. H. Naber
Harry Imel
Attys. France, France & Nady
Jas. R. McManus & Allan Shepherd.

Exhibit "M" attached to said Petition for Mandamus is as follows:

First Iowa Hydro Electric Cooperative
Muscatine, Iowa

September 23, 1955

Hon. Edward A. Doerr, Special Master
United States District Court
Southern District of Iowa
Davenport Division
Davenport, Iowa

Dear Special Master:

We are in receipt of various Orders concerning the case of First Iowa Hydro Electric Co-operative et al; vs. Iowa-Illinois Gas and Electric Company. In an Order issued by Judge Riley on September 20th, 1955, the Judge stated as follows:

'If you contemplate any action concerning your deposition now scheduled for resumption at Davenport on October 3rd, it will be handled through the Master.'

Since September 16th, 1955, the plaintiffs in this action have filed a Motion to Remove Counsel and inasmuch as that Motion has not been heard, it is respectfully requested that that Motion be taken care of at the earliest convenience of the Court and that Depositions be postponed until such time as the Court has disposed of the Motion and new counsel has been allowed adequate time to prepare to proceed in this matter. Inasmuch as the Order of Appointing a Special Master signed by Judge Riley on the 21st day of September, 1955 has referred

this matter to you, it is respectfully requested that the Depositions scheduled to resume on October 3rd be postponed until the Motion for Leave to Remove Counsel is disposed of and until such time as new counsel has an opportunity to prepare themselves, that they may adequately try the issues in this matter. As you undoubtedly know, the Deposition of Harry J. Strong is sealed and it is impossible for new counsel to adequately prepare for this case until the above Motion filed September 16th, 1955 for Leave to Remove Counsel is disposed of and new counsel is engaged and is allowed opportunity to acquaint themselves with the proceedings to date. In requesting this delay at this time and in also requesting that an early hearing be had on the Motion for Leave to Remove Counsel, First Iowa would like to reserve the right or the right of counsel that will be engaged to make any check which may be necessary upon qualifications of any appointments which are made during this interim when First Iowa is unrepresented by counsel.

Yours very truly,

/s/ H. J. Strong
Harry J. Strong, Secretary and Treasurer
First Iowa Hydro Electric Cooperative

October 20, 1955

Filed motion of individual plaintiffs entitled "Motion in Resistance to the Substitution of Any Party Plaintiff." (Summary of Motion)

The motion, executed and verified on October 20, 1955 by Harry Imel, on behalf of all individual plaintiffs, recites the institution of an action for involuntary bankruptcy against the corporate plaintiff, the appointment of a Receiver in advance of any adjudication in bankruptcy, and the intention of the corporate plaintiff to deny all alleged acts of bankruptcy and all allegations that the petitioners in bankruptcy constitute creditors of the corporate plaintiff. It further alleges that none of the individual plaintiffs has any bankruptcy proceeding

outstanding against him, that no receiver has been appointed to act for any of the individual plaintiffs, and that unless the court defers any action which would allow adverse interests to gain control of any part of this action to the detriment of the interests of the individual plaintiffs, without a complete adjudication of the rights of the parties affected, the individual plaintiffs will be denied a fair and impartial trial. Included in the prayer for relief is the request that the court refuse to accept any substitution of any party plaintiff until there has been a complete adjudication of the issues of bankruptcy in the bankruptcy suit.

October 21, 1955

(On October 21, 1955, there came on for hearing before Judge Riley at Des Moines, Iowa, for consideration, the affidavit of prejudice which had been filed by Harry J. Strong. Messrs. Nady, McManus and Shepherd were present. The court made the following statement:)

"THE COURT: There was assigned by order for this afternoon consideration of an affidavit of prejudice filed against this court by one Harry J. Strong. I think I shall turn first to it. By its order of October 14, 1955, this court directed that the affidavit of prejudice directed against the judge of this court and filed by the plaintiff here, Harry J. Strong, on his own behalf and purportedly as a representative of all other individual plaintiffs, and as an officer of the First Iowa Hydro Electric Cooperative Association, should come on to be heard today at 2 o'clock, p.m. as to its timeliness and sufficiency. Notice of this hearing was given by mailing a copy of the order to each of the plaintiffs and to their counsel of record, James D. France, Xavier C. Nady, J. R. McManus and Allan B. Shepherd. Such notice has been duly given.

"The affidavit charges that it is the belief of the affiant that the judge 'has personal bias and prejudice against our project, a hydro electric development on the Cedar River.' The rest of the affidavit is devoted to a statement of the reasons for such belief. Section 144 of the United States Code Annotated, Title 28, permits the filing of an affidavit of bias or prejudice when the judge before whom the matter is pending has a personal bias or prejudice either against the parties plaintiff or any of

them, or in favor of adverse parties or any of them. The authorities appear definitely to establish that my power is limited to inquiring into the timeliness and sufficiency of the affidavit. Accordingly, the affidavit has been so examined, and with those limitations. This action was filed February 18, 1954; the affidavit October 10, 1955. The court must find that it is not timely. As to its sufficiency, the affidavit fails to meet the requirements of Section 144 of Title 28 of the United States Code Annotated as to the personal bias or prejudice, since that charged here is against—and I quote—"is against our project" —end of quotation. The affidavit is not sufficient for the added reason that it is not accompanied by a certificate of counsel of record stating that it is made in good faith. The affidavit of Harry J. Strong attached is not such a certificate.

"It is, therefore, ordered and adjudged that the affidavit of bias and prejudice is neither timely nor sufficient, and for the other reasons fails to meet the requirements of Section 144 of Title 28, United States Code Annotated.

"It is, therefore, further ordered that the proceedings in this cause shall be continued as though such affidavit had not been filed. An exception is granted to those who deem themselves adversely effected by this ruling. I am going to sign this ruling now in open court this 21st day of October, 1955."

October 21, 1955

Filed Ruling and Order on Affidavit of Prejudice, entered order that Affidavit of Prejudice is not timely or sufficient and for other reasons fails to meet requirements of Section 144, Title 28, U. S. C. A.; that proceedings be continued as though affidavit had not been filed, Riley, J. (Copies mailed to all plaintiffs, their attorneys of record, all counsel for defendants and to Special Master.) (R. 102)

October 24, 1955

Filed Order postponing hearing on Motions to Dismiss to Nov. 7, 1955, at 11:00 o'clock a.m. at 725 Davenport Bank Building, Davenport, Iowa. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and Clay LeGrand.)

October 24, 1955

Filed Order that hearing will be held at 930 Davenport Bank Building, Davenport, Iowa, on October 28, 1955, at 10:30 a.m. re entry of proposed form of order. (Copies mailed to all plaintiffs and their attorneys of record.) (Said order is set out below:)

This order is made on my own initiative.

Attached hereto marked "Exhibit A" and hereby made a part hereof is a form of proposed order.

A hearing will be held by me at 930 Davenport Bank Building, Davenport, Iowa, on October 28th, 1955, at 10:30 o'clock a.m. to determine whether I shall make an order substantially in the form of the proposed order, Exhibit A. Plaintiffs are required to appear at said hearing and show cause, if any there be, why such order shall not be made. In the event that plaintiffs shall fail so to appear, such order will be made.

This order shall be served by the Clerk by mail upon plaintiffs by serving their attorneys of record and plaintiffs themselves.

Dated October 24th, 1955.

EDWARD A. DOERR,
Special Master.

(The "Exhibit A" attached to the Order is substantially the same as the order reproduced at R. 103.)

October 28, 1955

(Abstract of proceedings before Special Master re proposed order to strike *pro se* documents.) On October 28th there came on before the Special Master for hearing on his Order to Show Cause of October 24th the question as to whether or not the five documents filed on October 17th as set forth above and which were not signed by any of the attorneys of record or of counsel should be stricken from the files. At this hearing attorneys of record appeared for plaintiffs, but none of the plaintiffs appeared in person, nor did any of the representatives or officers of the cooperative appear.

James R. McManus, attorney for plaintiffs, made the following objection:

"We object and protest to any action taken by the Special Master or any hearing being held before the Special Master for the reason that the order made by Judge William F. Riley on September 21, 1955, appointing a Special Master, was void; that the Special Master has no jurisdiction, power or authority to proceed, or take any action or proceedings, for the reason that the order made by Judge Riley on September 21, 1955 constituted an abuse of discretion on the part of the judge and, among other things, deprived the plaintiffs and these attorneys of record for the plaintiffs of their right to a trial by jury as guaranteed to them in a suit of this kind, wherein a jury has heretofore been demanded, in violation of the rights guaranteed to them by the Seventh Amendment to the Constitution of the United States; and the special order and procedings also denies to them due process of law and deprives them of due process of law, as guaranteed to them by the provisions of the Fifth Amendment to the Constitution of the United States. And in view of that situation, in behalf of the attorneys of record and the plaintiffs as well, we raise that question in our own behalf and in behalf of the plaintiffs because we take the view that Judge Riley's order of September 21, 1955, appointing a Special Master, was void because it impinged the rights and interests of the plaintiffs and their attorneys of record under the Fifth Amendment and the Seventh Amendment of the Constitution of the United States. I make that objection, Mr. Special Master, simply for the purpose of preserving the record, and would like to have the record show that we do urge that objection at this time.

SPECIAL MASTER DOERR: The objection is overruled. If you care to take further part in the proceedings, why, that can be done without prejudice to the objections you have asserted."

(Tr. of "Proceedings Before Special Master Edward A. Doerr, on Order to Show Cause at 930 Davenport Bank Building, Davenport, Iowa, on Friday, October 28, 1955, at 10:30 o'clock a.m.," Page 5.)

October 28, 1955

Filed order by Special Master Edward A. Doerr directing, among other things, that plaintiffs' motions specified therein be physically removed from the court files. (Copies mailed to all plaintiffs and attorneys of record and to attorneys of record for defendants.) (R. 103)

November 4, 1955

Filed order that hearing on motions to dismiss of defendants be continued to November 18, 1955, at 11:00 a.m., Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and attorneys of record for defendants.)

November 18, 1955

(Abstract of proceedings before Special Master on defendants' motion to dismiss.) On November 18, 1955, there came on before the Special Master for hearing defendants' motion to dismiss. James R. McManus and James D. Frances, attorneys of record for plaintiffs, appeared and repeated the same objections to any action or proceeding before the special Master as were urged by Mr. McManus at the hearing on October 28, 1955. The objection was overruled by the Master. The following proceedings then took place:

"MR. HARRY J. STRONG: Harry J. Strong, appearing as an individual plaintiff and as representing the other four individual plaintiffs, F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber; and, as well, representing the First Iowa Hydro Electric Cooperative only so far as that which will not conflict with any order of the Court or presumption that a receiver's counsel may speak only for the cooperative. We question that anyone can substitute the cooperative, First Iowa Hydro Electric Cooperative; meaning, in other words, we question the right of any court or anyone substituting for that plaintiff.

"SPECIAL MASTER DOERR: Your recitation of your appearance will be noted, Mr. Strong

"SPECIAL MASTER DOERR: The privilege to appear in person or on behalf of the First Iowa Hydro Electric Cooperative is not to be understood as granted by reason of the noting of your recited appearance."

(Tr. 3-4, Master's Exhibit 4.)

"MR. WALKER: I would like to move the Special Master that you disregard the appearance of Harry J. Strong on behalf of himself or the plaintiff First Iowa Hydro Electric Cooperative or any of the other individual plaintiffs, for the reason that all of the plaintiffs are here represented by counsel; and for the further reason that Mr. Strong's appearance on behalf of others would appear to be irregular, in that he is not a member of this court—

"MR. McMANUS: (Interposing)—Of the bar.

"MR. WALKER: (Continuing)—Of the bar.

"MR. STRONG: Mr. Master, I would like to have the record state that on September 1, 1955, the First Iowa Hydro Electric Cooperative and five individual plaintiffs, including myself, discharged the attorneys of record, having lost faith in that counsel. And we still have lost faith. We believe that since the 2nd day of September, when the Court was given notice of that action, the Court has seen fit to freeze us in a position where we have been unable to get counsel. I would like to have the record show that on Monday of this week I appeared before the Special Master, personally, and because of the orders of this Court or the Master refuses me, as an individual, or any of the other individual plaintiffs, the right to file anything in Court, and directs the Clerks of Courts not to receive anything, that I have attempted all week to get counsel to make an appearance, as is provided for in the order of the Master, to clear the way to where we can get counsel of our choosing. I have been unable to do so. It is our opinion we will be unable to get any Iowa attorney or attorneys in this judicial district to handle this matter. I will continue to pursue, as an individual, the effort to get counsel of my choosing—one whom we will have faith in. I feel that I have every right that any counsel

could give me, in appearing in this or any other court of this United States.

"MR. WALKER: I renew my objection, Your Honor.

"SPECIAL MASTER DOERR: Mr. Walker's objection is sustained.

"MR. STRONG: Does that mean, Mr. Master, that I am denied the right to appear here in behalf of myself?

"SPECIAL MASTER DOERR: That does mean that you are denied the right to appear here in behalf of yourself. You cannot appear both by attorneys of record and in person. You have started your appearance in this case through attorneys of record. You have not conformed to law or the orders of the Court or of the Special Master in relation to the substitution of those attorneys. They will remain your attorneys of record until there is a legal substitution.

"MR. STRONG: I should like to have, Mr. Master, the record show that certain allegations were made—and made before this Master and this Court—that were heard by this Master, and which were made under oath and verified, and in which the record will show there was not one word of contradiction to those allegations. And those allegations went to the misconduct of counsel. And the record will show that the Court has completely ignored those allegations. The attorneys of record made not one word of record denying them and, therefore, that record stands and this Court has the responsibility that if and when something is made under verification and under oath, as an allegation, and not denied, it stands as the law that they are guilty of misconduct. The Court has seen fit to disregard that. The wisdom of the attorneys, of course, is far greater than mine as a layman. They saw fit to ignore it. For that reason I want this objection to show in the record, in behalf of myself as an individual, that it is not a good order, nor is it in conformance with any law; and the responsibility rests upon this Court to protect the individuals, and particularly the plaintiffs, when they are without counsel. If that is the ruling of the Master I shall retire from the room.

"SPECIAL MASTER DOERR: All statements made by Harry J. Strong in the course of this hearing, except the fact of his presence here, will be stricken from the record and will be given no effect.

"MR. STRONG: I shall ask that the decision be shown in the record, and I should like the record to show that I am personally now ordering a copy of the transcript. And I should like to further ask that if there is any off-of-the-record discussion that that not be taken in the presence of a reporter; but that it be properly handled by a recess and the reporter leave the room—not continue to make record off-of-the-record that does not show in the transcript.

"SPECIAL MASTER DOERR: What has just been added by Mr. Strong will likewise be ignored.

"MR. McMANUS: Mr. Special Master, may the record show that none of the attorneys of record have been paid their fees as required by your order of October 5, 1955?

"SPECIAL MASTER DOERR: The record will show your recitation of that statement.

"MR. WALKER: Mr. Special Master, I am wondering if it would serve any purpose to ask Mr. Strong, now that he is present, if he still refuses to testify.

"MR. McMANUS: Well, wait a minute. That's not the purpose of this hearing.

"MR. LARNED WATERMAN: Let the record show that this moment Mr. Strong departed from this hearing room.

"SPECIAL MASTER DOERR: The record will so show. Gentlemen, I believe we are now ready for argument on the motions to dismiss."

(Tr. 5-8, Master's Exhibit 4.)

Prior to dismissing the reporter, Mr. McManus mentioned that an involuntary bankruptcy petition had been filed against the First Iowa Hydro-Electric Cooperative during October in

the United States District Court for the Southern District of Iowa and that it was then pending. Mr. Waterman, counsel for one of defendants, suggested that the record ought to show that the bankruptcy petition was filed sometime after the defendants' motion to dismiss which had been filed on October 10, 1955. The following occurred:

"MR. WALKER: Well, I think we can stipulate that, can't we, Mr. McManus?

"MR. McMANUS: What is that, Mr. Walker?

"MR. WALKER: That the petition of bankruptcy was filed after the motion of dismissal was filed?

MR. McMANUS: That's correct.

"MR. WALKER: And you would agree and stipulate to that?

"MR. McMANUS: Yes, I agree to that. That's correct." (Tr. 11, Master's Exhibit 4.)

November 21, 1955

Filed Order on Motion to Dismiss, that deposition of Harry J. Strong will be resumed on December 6, 1955, at 11:00 o'clock a.m. at 725 Davenport Bank Building, Davenport, Iowa; that Harry J. Strong appear at said time for taking of deposition; in the event that Harry J. Strong shall not comply, then Div. I and Div. III, Para. 1 of Motion to Dismiss will be granted against Harry J. Strong and First Iowa Hydro Electric Cooperative and an order of dismissal supplementary to this order will be made; Div. II and Div. III, para. 2 of Motions to Dismiss of Defendants are denied without prejudice to the renewal thereof at any time, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and to attorneys of record for defendants.) (R. 108)

November 28, 1955

Filed Notice of Appeal by F. A. E. Gillmor, Harry J. Strong and P. H. Naber, Individual Plaintiffs. (Said notice is set out below:)

NOTICE OF APPEAL

Notice is hereby given that F. A. E. Gillmor, Harry J. Strong and P. H. Naber, individual plaintiffs, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Order of Edward A. Doerr, Special Master, entered in this action on the 28th day of October, 1955.

Copy of said Order dated October 28, 1955 is attached hereto and made a part hereof.

Dated this 26th day of November, 1955.

F. A. E. GILLMOR,
Individual Plaintiff.
HARRY J. STRONG,
Individual Plaintiff.
P. H. NABER,
Individual Plaintiff.

(There is attached a copy of the Order signed by Edward A. Doerr, Special Master, and filed on October 28, 1955.) (R. 103)

November 29, 1955

Filed order that taking of deposition of Harry J. Strong be resumed on December 20, 1955, at 11:00 o'clock a.m. instead of December 6, 1955, all other provisions of order of November 21, 1955, to remain the same, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and to attorneys or record for defendants.) (Said order is set out below:)

Plaintiffs by their attorneys of record have orally applied for a delay in the taking of the deposition of plaintiff Harry J. Strong which was to have been resumed on December 6th, 1955, under my order of November 21st, 1955. The application has been informally discussed by me with attorneys for certain of the defendants. None of the defendants have agreed to a delay and this order is made over the informal protests of some of them and will be considered to be ex parte as to all of them. Since my order of November 21st, 1955, a trial date in the week of December 12th, 1955, has been set on the petition in bankruptcy filed against First Iowa Hydro Electric Cooperative.

The result of the trial may be of importance in this case. Under the recited circumstances, I conclude that plaintiffs' application should be granted.

It is ordered that the taking of the deposition of plaintiff Harry J. Strong shall be resumed on December 20th, 1955, at 11:00 a.m. instead of December 6th, 1955, and that (except for the change in date) all of the provisions of my order of November 21st, 1955, with relation to the taking of such deposition shall remain in full force and effect.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record, and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

December 19, 1955.

(Abstract of proceedings before Special Master on defendants' motion to determine law points.) On December 19, 1955, there came on before the Special Master, pursuant to order and notice, the motion of defendant Iowa-Illinois Gas and Electric Company to determine points of law raised in its answer. Plaintiffs were represented by Allan R. Shepherd, an attorney of record. The following proceedings occurred:

On December 19, 1955, there came on before the Special Master, pursuant to order and notice, the motion of defendant Iowa-Illinois Gas and Electric Company to determine points of law raised in its answer. Plaintiffs were represented by Allan R. Shepherd, an attorney of record. The following proceedings occurred:

> "MR. ALLAN R. SHEPHERD: May it be understood that my appearance in behalf of plaintiffs is subject to the objections which have been several times raised in the past by Mr. McManus as to the powers and jurisdiction of the Master, in the light of our previous objections to his appointment as violating the plaintiffs' rights to trial to a jury, as guaranteed them in a suit like this where a jury has been heretofore demanded, and in violation of the rights guaranteed them in the way of due process of law by the Fifth Amendment—that is, the rights guaranteed by the Seventh and Fifth Amendments to the Constitution

of the United States—along the same lines as previously? I believe Mr. McManus has been in the habit of making those objections at each of the meetings, has he not?

MR. DOERR: That's right. The objections are overruled. Your participation in the hearing will be without prejudice to the objections, or waiver of them."

(Tr. 3-4, Master's Exhibit 5.)

December 20, 1955

(Abstract of proceedings before Special Master. Allan R. Shepherd, one of the attorneys of record for plaintiffs, was present, as well as counsel for each of the defendants. Harry J. Strong and F. A. E. Gillmor were also present, together with observers Glenn Elston, of Rock Island, and a Mr. Benson. (Tr, 1960-1963) The following proceedings were had:)

"THE MASTER: Gentlemen, this hearing is scheduled for the resumption of discovery deposition proceedings. I believe we would better start off as usual by a recitation of appearances. We will start with you, Mr. Shepherd. If you care to make a record in that connection, do so.

MR. SHEPHERD: First, in conformity with Mr. McManus' established practice, I want to object to the power and jurisdiction of the Special Master on the ground that the order entered by Judge Riley on or about September 21, 1955, appointing this Master was void in contravention of the rights of the plaintiffs and their attorneys of record to a trial by jury where demanded and to due process of law under the 7th and 5th Amendments to the Constitution of the United States.

THE MASTER: The objection is overruled. Your partticipation in these proceedings will be understood to be without waiver of the objection."

Appearances for plaintiffs and defendants were noted and thereupon the following proceedings occurred:

"THE MASTER: Mr. Strong, will you take the stand then?

"MR. STRONG: Mr. Master Doerr, I wish to make a statement before this hearing and for the record.

"I was called and appeared on October 10th to continue giving testimony in this deposition and declined to testify under my constitutional right of having counsel with me in whom I have faith and trust.

"The Court has been on notice since September 2nd that we discharged the attorneys of record, namely: France, France & Nady and J. R. McManus and Allan R. Shepherd.

"The Court knows we filed under oath allegations of misconduct; answer was made by these attorneys, not under oath. A hearing was held and these attorneys had their opportunity to deny the charges, but not one word appears in the transcript of denial; therefore our charges stand as proved.

"Without one single word of denial of this misconduct, you, Mr. Master, found there is no misconduct. That matter has been appealed to the 8th Circuit Court of Appeals. I say now, it is up to the Appeals Court to dispose of that matter before it can go any further.

"Later in this very room and before you, Mr. Master, while you were presiding and in session, you brought up the question of my being cited for contempt of Court—the attorneys for the defense objected to my being cited—yet, and I am sure it is discharged attorneys, an attorney this court will not let us discharge, suggested to you, Mr. Master, that I should be cited quote, 'that may bring this boy to his senses' end quote. That is not in my best interest.

"Other of our discharged attorneys were present, heard this and did not say one word; thereby their silence was not defending my best interest. Their silence was complete acquiescence to what Mr. McManus said—that I should be cited for contempt of Court.

"Does anyone believe I should be compelled to give testimony in this Court without attorneys in whom I have trust and faith?

"As to the $2500 that the Court has ordered us to pay—to carry the costs of taking this deposition, I want it known that I purchased a bank check for the $2500 on

September 28, 1955, then I called my associate plaintiffs to advise them. They insisted that I get legal advice as to the propriety of paying in this money.

"It was our understanding the Court ordered the Union Electric Company to pay all the costs. Without our knowledge the attorneys we had went before the Court asking that this Utility pay them a fee while this deposition was being heard. I understand the Court denied same.

"In this very room Mr. Bergstrom, the expert in anti-trust law, said he was the one who got the words 'office rental' into the order, and therein lays the grounds for the Court to come at us to put up the $2,500. This, too, ha been appealed and should be disposed of before this Court can or should go any further with this particular matter.

"I say to you, we do not want this case dismissed because of our failure to pay into the Court the $2500. We do not have the $2500. What money as would be available, and I say to you if we had our funds today, I would pay the $2500 into the Clerk of Court, but under protest.

"Our funds in the amount of $5,081.81 were improperly ordered turned over to a receiver in an involuntary bankruptcy case in this same Court (being Case No. 1-177) that money did not belong to the First Iowa Hydro Electric Cooperative. The Court knew this and ordered me to be put in jail—and I was put in jail until our attorney, in this case, turned the money over to the receiver.

"The Court was advised I turned this money over voluntarily to the attorney in that bankruptcy case, No. 1-177, on November 12, 1955, and I was put in jail on the 29th.

"Our attorney advised me that I could not go to jail, that if I was cited, all that it took to purge the contempt was to turn it over, that the Court would have to hold a hearing or show cause, before anyone could be jailed. I was in jail. They say it can't be done, but I was there. I ordered the attorney to turn over the money, three days before I was jailed. The attorney for the receiver was fully advised of all this.

"This same attorney told me Judge Riley could be held personally liable for putting me in jail and not giving me a hearing.

"We were declared not bankrupt by the jury after two days of trial.

"This tangent case of bankruptcy has become a part of our lawsuit as here being heard. Our money is tied up until it is returned, if the funds are returned we will pay the $2500 into the Court.

"I cannot see how this Court with one hand can take our funds away from us and with the other hand say, pay $2500 or the main lawsuit will be dismissed.

"Again I say to you, Mr. Master, this whole thing has been appealed, notice of such appeal was made on November 26th, the filing fee was paid, and the bond has been furnished.

"The matter is from the moment of that Notice of Appeal being read by the Clerk of Court out of the jurisdiction of this Court, and I cannot understand the persistence to ignore it and continue on as if it were not filed.

"Under the circumstances of the Court suppressing so much of the record that it is impossible for me to fully acquaint my attorney so he can come into this Court and properly protect my interests, and being without counsel of my own choice and in whom I have trust and faith, I believe I would be justified in refusing to testify.

"Therefore I stand upon my constitutional rights and ask that I be excused from testifying until I have counsel of my own choosing and in whom I have faith. I do not have faith in the attorneys here presuming to represent me.

"Your Honor, if you compel me to go on the witness stand, I am going on. I do not want to be in contempt of this Court, and I don't want to spend Christmas in jail. I ask that I be excused from testifying until I can get attorneys of my choice, and in whom I have faith while I am testifying on the witness stand.

"THE MASTER: You have not been threatened with contempt procedure so far as I am aware in connection with these discovery deposition proceedings. The alternative which has been put up to you is to suffer a dismissal of this case so far as you and the First Iowa Hydro Electric Cooperative are concerned, in case you refuse to testify.

"Your request to be excused from testifying is denied, and you are instructed now to submit yourself as a witness for discovery deposition proceedings.

Strong then asked the Master whether his refusal to testify would subject him to contempt proceedings or whether it "will be just dismissal of the case," saying that "you may proceed with the dismissal as your judgment or your decision. I will chance the dismissal." (Tr. 1970) The Master told Strong that prosecution of contempt procedure was not within his control and that any application for contempt would be made to the court and not to the master. After discussion between Strong and the Master, Strong requested a few minutes with which to consult with Mr. Shepherd, one of counsel of record for the plaintiffs. In response to this request, the Master granted a recess. After the recess Strong again stated that he would refuse to testify and the following occurred:

"THE MASTER: You understand the consequence of your refusal to testify will be the entry of an order of dismissal by me of this action insofar as it is brought by Harry J. Strong and First Iowa Hydro Electric Cooperative, do you?

"MR. STRONG: I understand that, Your Honor.

"THE MASTER: Very well. That concludes our hearing, unless anyone else has anything for the record. Now is the time to offer it. (Tr. 1975)

It was thereupon moved on behalf of the defendants that in view of the termination of the deposition by the witness Strong the Special Commissioner be directed to submit the portion of the deposition to date to Mr. Strong for signature, and in the event of his signature or failure to sign within twenty (20) days that the Special Commissioner be directed to file that

deposition with the Clerk of the District Court without prejudice to any rights that the defendants may have to further interrogate Mr. Strong at some future time.

"THE MASTER: The motion will be granted.

"MR. SHUTTLEWORTH: Mr. Special Master, it seems to me in view of the references that have been made just as statements and also some of the paper work of the bankruptcy proceedings, I believe the record should show at this time, and if Mr. Shepherd will concur in a stipulation, so that whatever it is worth, this record will definitely show that the proceedings in the matter of the First Hydro Electric Cooperative Association, involuntary petition in bankruptcy, McDougal & Condon, Inc., Lloyd Drexler and Seth Gooder, petitioners, in the United States District Court for the Southern District of Iowa, Davenport Division, as being an involuntary petition in bankruptcy and carrying the title Bankruptcy Number 1-177, which was tried and concluded last week, in connection with the trial of which the First Hydro was represented by two firms of attorneys—a Mr. MacLaughlin, Francis J. MacLaughlin of Davenport, Iowa, and another firm, Bell, Farrar & Scott of Rock Island, both of whom appeared and represented First Hydro Electric Cooperative Association; and that in connection with that trial, the jury returned a verdict in favor of the First Hydro Electric Cooperative Association, and it was not adjudged a bankrupt.

"Will you stipulate to that fact, Mr. Shepherd?

"MR. SHEPHERD: I understand that that is true. I have never seen those proceedings, and I wasn't present, but I have no question that that is the fact. I wasn't present, and I can't tell you that I saw it. I was in Des Moines.

"But my information is that you are absolutely correct.

"MR. SHUTTLEWORTH: Unless you can stipulate to it—

"MR. SHEPHERD: I know nothing but hearsay. I have never seen the record. I wasn't there, Mr. Shuttleworth. I understand that what you are saying is true, but I can't tell you of my own knowledge.

"I have no question that it is true, but I don't know it myself.

"MR. SHUTTLEWORTH: Do you have any objection to that?

"MR. SHEPHERD: No, but I can't say—

"MR. MILLER: Do you have any objection to it being made part of the record here?

"MR. SHEPHERD: No, I don't object.

December 22, 1955

Filed Order that Special Commissioner Michael T. Organ shall communicate with Harry J. Strong within 7 days from the date hereof re submission to him of transcript of depositions; for entering changes and for signing of said depositions; if deposition is signed within 20 days, or if not signed within such period, Special Commissioner shall sign same, giving reasons for not signing, if any, and shall file deposition with the Clerk of this Court; depositions so filed may be used by defendants as provided by the Federal Rules of Civil Procedure, but said filing is without prejudice to all rights of defendant to further interrogate said witness, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and to Michael T. Organ, Commissioner.)

December 22, 1955

Filed Order dismissing action as to plaintiffs Harry J. Strong, and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and Michael T. Organ, Commissioner.) (R. 115)

December 22, 1955

Filed Order that deposition of plaintiff F. A. E. Gillmor shall be taken at 11:00 o'clock a.m. on January 10, 1956, at 725 Davenport Bank Building, Davenport, Iowa, and F. A. E. Gill-

mor is ordered to attend and submit to taking of his deposition, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and Michael T. Organ, Commissioner.) (Said order is set out below:)

Pursuant to notice heretofore given and in conformity with prior orders of the court, it is ordered that the deposition of plaintiff F. A. E. Gillmor shall be taken commencing at 11:00 o'clock a.m. on January 10, 1956, at room 725 Davenport Bank Building, Davenport, Iowa, and continuing thereafter in the regular course of procedure. The plaintiff F. A. E. Gillmor is ordered to attend and submit to the taking of his deposition accordingly.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

December 30, 1955

Filed order of Special Master Doerr re appointment of Special Commissioners. (Said order is set out below:)

On March 10, 1954, defendant Union Electric Power Company noticed the depositions of the individual plaintiffs and others. On May 16, 1955, the court entered an order relating to deposition procedures and appointing Michael T. Organ, or in his absence Earl W. Radford, both of Chicago, Illinois, as Commissioner to take the deposition of Harry J. Strong. On September 21, 1955, the court entered an order appointing Edward A. Doerr as Special Master with all powers authorized by Rule 53. On December 22, 1955, the Special Master entered an order requiring plaintiff F. A. E. Gillmor to appear for his deposition commencing at 11:00 A.M. on January 10, 1956, at room 725, Davenport Bank Building, Davenport, Iowa. It is contemplated that the deposition of F. A. E. Gillmor will be followed by the depositions, to be later scheduled, of the other individual plaintiffs, Carl J. Mitzner, Harry Imel and P. H. Naber, and of witnesses Ray Norris and J. M. Roth.

Accordingly, it is ordered that Michael T. Organ, or in his absence Earl W. Radford, both of Chicago, Illinois, be ap-

pointed as Special Commissioner, in accordance with Rules 28 and 30, for the taking of the depositions of F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber, Ray Norris and J. M. Roth, and the Special Commissioner is for that purpose commissioned to swear the witnesses, to proceed with the taking of the depositions when and as scheduled, and to sign the respective certificates upon the completion of the taking of each deposition.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

Dated December 30, 1955.

EDWARD A. DOERR,
Special Master.

January 3, 1956

Filed plaintiffs' petition for review and proof of service. (R. 116)

January 4, 1956

Filed report of Special Master Doerr. (R. 120)

January 4, 1956

Filed Exhibits 1, 2, 3, 4 and 5 to Report of Special Master Doerr. (These exhibits constitute the transcript of the hearings and proceedings referred to in the Master's report, Exhibit 1 being the hearing on October 3, 1955; Exhibits 2 and 3—October 10, 1955; Exhibit 4—November 18, 1955, and Exhibit 5—December 20, 1955.)

January 9, 1956

Mailed notice with copy of report of Special Master Doerr attached to all plaintiffs, their attorneys of record and attorneys of record for defendants.

January 9, 1956

Filed order for hearing on report of Special Master Doerr and petition for review and prior order to be heard at Des Moines, Iowa, at 9:30 a.m., Janury 20, 1956, Riley, J. (Copies mailed to all plaintiffs, their attorneys of record and attorneys of record for all defendants, and to Special Master.) (Said order is set out below:)

It appearing to the court that the Special Master has filed and has given notice of his report of certain proceedings culminating in his order of December 22, 1955, dismissing as to certain named plaintiffs and asking this court's approval and confirmation thereof; and it appearing, too, that all plaintiffs by their counsel of record have filed a Petition for Review of such order, asking that it be vacated; and it further appearing that all defendants joined in a Motion to Dismiss filed herein on October 11, 1955, by defendant Union Electric Power Co., which, among other reasons, asked for dismissal because of refusal of plaintiff Harry J. Strong to testify in discovery depositions and of all plaintiffs to make deposit of the amount required by a prior order of this court;

IT IS NOW ORDERED that the report of the Special Master of December 22, 1955, relating to the dismissal of this cause as to plaintiffs First Iowa Hydro Electric Cooperative and Harry J. Strong, and the Petition for Review filed by counsel of record for plaintiffs, and the disobedience of all plaintiffs herein to the order of this court of September 21, 1955, requiring the deposit of certain funds into the registry of this court, shall come on to be heard at Des Moines, Iowa, before this court at 9:30 o'clock a.m., on Friday, January 20, 1956, and that notice of said hearing shall be given by mailing to all counsel of record and to the individual plaintiffs a copy of this order.

IT IS FURTHER ORDERED, to permit all interested parties to be advised, that the order of September 21, 1955, appointing the Special Master does not and cannot deprive plaintiffs of their right of trial by jury if their request therefor has been seasonably made, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon the trial of this cause, but does empower the Special Master to proceed in respect of legal questions to be ruled

upon, subject to the court's approval, and to have such other powers; not including trial of the issues, as are described in Rule 53(c) of the Federal Rules of Civil Procedure, or otherwise stated in the order of appointment of September 21, 1955, and not inconsistent with this order.

January 10, 1956

Filed box containing deposition of Harry J. Strong taken at Davenport, Iowa, on June 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, July 11, 12, October 10 and December 20, 1955, on behalf of defendant Union Electric Power Co.

January 10, 1956

(Abstract of deposition of F. A. E. Gillmor before Special Master, held January 10, 1956.)

The appearances of the attorneys of plaintiff were noted and stated as follows:

"APPEARANCES:

MR. JAMES D. FRANCE,
XAVIER C. NADY,
FRANCE, FRANCE & NADY,
First National Bank Building,
Tipton, Iowa.

MR. JAMES R. McMANUS,
MR. ALLAN R. SHEPHERD,
417 Fleming Building,
Des Moines, Iowa.

HALEY, DOTY & WOLLENBERG,
1735 DeSales Street,
Washington, D. C.
(Of Counsel)
Attorneys for plaintiffs;
By: MR. JAMES R. McMANUS."

(Tr. 2, F. A. E. Gillmor Deposition)

One or more of the attorneys of record for each of the defendants announced appearance, and in addition to the Special

Master there were present Mr. F. A. E. Gillmor, Mr. Harry J. Strong, and Mr. Richard Honts. (Tr. 5, Gillmor Deposition.)

The following proceedings were had:

"MR. McMANUS: Mr. Special Master, I would like to request counsel for the defendants to agree that in order to avoid encumbering the record, I may be given the benefit and advantage of the objections that I have heretofore urged in proceedings before the Special Master with respect to the right of jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, in order to avoid repeating them. I am wondering if you will all signify your willingness that I may be given the benefit of these objections, the same as before, without repeating them.

"THE MASTER: If I hear no objection, I will assume that it is agreeable to everyone here. We will start out as usual by reciting the appearances.

"MR. McMANUS: James R. McManus, appearing for the plaintiffs in this case, and also appearing as counsel for the attorneys of record for plaintiffs."

Appearances defendants were noted, and thereupon the following proceedings occurred:

"THE MASTER: Mr. Gillmor, this meeting is called for the purpose of taking your deposition.

"I will ask you to come forward for that purpose, and I will ask Mr. Organ to administer the oath to you. Mr. Organ is the Commissioner.

"THE COMMISSIONER: You are a little hard of hearing?

"MR. GILLMOR: (No response.)

"THE MASTER: You are hard of hearing?

"MR. GILLMOR: Yes.

"THE COMMISSIONER: Will you raise your right hand?

(Witness raised right hand.)

"THE COMMISSIONER: What is your name, please?

"Will you please keep your hand raised?

(Witness lowered hand.)

(Mr. Gillmor then read from a prepared paper as follows:)

"MR. GILLMOR: Gentlemen, I have been called to testify, and, Mr. Doerr, I am F. A. E. Gillmor, President of First Iowa Hydro Electric Cooperative. I wish to make a statement before this hearing and for the record.

"I am called here to give testimony when the case of the First Iowa Hydro Electric Cooperative stands dismissed by Master Doerr as per his order of December 22, 1955. The matter is now before Judge William F. Riley for his ruling on such dismissal and should be disposed of before any further proceeding, as is here and now contemplated.

"I and the other plaintiffs, discharged the attorneys of record for misconduct and the Court has been on notice of such action since September 2, 1955.

"The Court prefers to change our motion to remove the attorneys to one of substitution and improperly ruled accordingly.

"That matter is before the Circuit Court of Appeals and we feel confident it will be reversed. Also, the qualifications of this Master and his appointment will be before the Court of Appeals; that, too, I feel will be undone.

"The appointment of the previous Master, Wayne Cook, will be before the Appeals Court; our showing of him, as in our opinion, being a chief counsel of the defendants deserves to be corrected.

"I, being without counsel of my own choosing, with this Court's action making it impossible for me to get counsel in whom I have trust and faith—with this Court trying to compel me to give testimony with counsel in whom I have lost confidence, faith and trust, and knowing we have discharged those who presume to represent me,

I will stand on my Constitutional rights and ask that I be excused from testifying.

"THE MASTER: Mr. Gillmor, I cannot excuse you from testifying. I must require you to testify. You will either have to submit to the taking of your deposition or refuse.

"A request that you be excused is denied.

"MR. GILLMOR: I want it to be known by all, I do not fear any questions that may be asked—we have nothing to hide or evade.

"My position is, this Court has shown itself so completely prejudiced and unfriendly that together with attorneys supposedly to represent us who can be influenced by the Court and willing to sell us out and not work in our best interest, there is nothing I can do but refuse to testify and await the results of a higher Court to set things right.

"MR. McMANUS: May I say something?

"MR. GILLMOR: You are not my attorney.

"MR. McMANUS: You just said that your attorneys are trying to sell you out. Do you have any evidence to substantiate or back up the statement that you made; because you are going to be given an opportunity to tell it to the Polk County Grand Jury very soon. So you had better be getting ready. If you have anything to say, I invite you to tell these gentlemen what you know to back up the statement you just made.

"MR. GILLMOR: You have it in the record.

"MR. McMANUS: Will you tell us what it is?

"MR. GILLMOR: It is in the record. You ought to know.

"MR. McMANUS: You don't know, and there isn't any such thing.

"MR. GILLMOR: I don't mean to be ungentlemanly or defiant, but I want a fair deal.

"THE MASTER: Mr. Gillmor, I understand that you do refuse to testify, is that correct?

"MR. GILLMOR: Yes, that is correct, according to my Constitutional rights.

"Put that in the record.

"MR. WALKER: (Addressing Mr. Gillmor.)

"Will you wait just a moment, Mr. Gillmor?

"I would like to renew the motion to dismiss that was made as to the First Iowa Hydro Electric Cooperative and Harry J. Strong in its entirety as to this plaintiff, F. A. E. Gillmor.

"I would also, having now incorporated that motion to dismiss as to Gillmor, ask the Special Master if he will now rule upon that motion to the extent of putting Mr. Gillmor on notice that he will be dismissed if he refuses to testify further.

"MR. LARNED WATERMAN: I would like the record to show that Iowa-Illinois Gas and Electric Company joins in and adopts the motion of Union Electric Power Company as to F. A. E. Gillmor, plaintiff.

"MR. McMANUS: Gentlemen, I would suggest that if you want to file a motion, it cannot be done in this informal way, and you will have to file a written motion and serve copies of it in accordance with the Rules.

"MR. SHUTTLEWORTH: If the Master please, I request that Mr. Gillmor be requested to stay in the room until we are through with this proceeding.

"THE MASTER: Let the record show that he has, of his own accord, left the hearing room.

"By 'he,' I refer to the plaintiff, F. A. E. Gillmor.

"MR. STEELE: Does the record show that Mr. Gillmor's statement was read from a prepared paper?

"THE MASTER: The record will show that the statement read by Mr. Gillmor was read from a paper in his possession." (Tr. 8-14, Gillmor Deposition)

Thereupon, following the departure of Mr. Gillmor, a discussion was had as to the time of taking the depositions of the three remaining plaintiffs, during the course of which the following colloquy occurred.

"THE MASTER: I would be disposed to make it one week from today. There are three remaining plaintiffs, and to cite them successively, for 11:00 a.m., 1:00 p.m. and 2:00 p.m., one week from today.

"MR. STRONG: Mr. Doerr, isn't it true that this matter of dismissal on the case against the First Iowa Hydro Electric Cooperative and H. J. Strong is now before Judge Riley, and set for hearing in Des Moines on January 20th of this year?

"MR. SHUTTLEWORTH: Does the reporter have the name of the party who is making this speech?

"MR. STRONG: H. J. Strong, and a pretty good speech, too.

"THE MASTER: I can't listen to you, Mr. Strong.

"MR. STRONG: I am a plaintiff in this case.

"THE MASTER: I can listen to you only as you speak through your attorney of record, Mr. McManus.

"MR. STRONG: I have no attorney. I want the Court to be on notice that the Judge has set January 20th for a hearing in Des Moines on this matter of dismissal; and why this Court pursues and persistently pursues an arbitrary position of not wanting it disposed of by the Court, in which hands it is at this time, I cannot understand.

"THE MASTER: I don't want to quarrel with you. I must be consistent in the position that I have taken.

"MR. STRONG: I wanted to make our objections very, very clear: That we expect the Court to dispose of the matter that is before them before there is any further proceeding in the matter here. Building up a record for the defendants doesn't help any at all, nor it certainly isn't any help to the plaintiffs. I can't see that it will be of any help to the defendants.

"THE MASTER: Mr. Strong's remarks will be given no force or effect, and will not be considered a part of the record." (Tr. 19-20, Gillmor Deposition)

The proceedings were adjourned to reconvene at 2:00 p.m., the same day at the same place. The attorneys of record for plaintiffs and defendants were present as before, and also present were Mr. Strong and Mr. Honts, at which time the Master announced that since the morning session he had reached the conclusion that oral motion could not be considered and that it would have to be put in written form and notice given, referring to the motion to dismiss of the defendants by reason of the acts and conduct of the plaintiff Gillmor individually and as an officer and director of the corporate plaintiff. (Tr. 23-31, Gillmor Deposition.) The Master then announced that the written motion to dismiss of the defendants filed January 10, 1956, would come on for hearing at Room 725 Davenport Bank Building, Davenport, Iowa, on the 16th day of January, 1956, at 3:00 p.m., and that an order to that effect would be entered and that these proceedings would be adjourned until Monday, January 16, 1956, at 11:00 a.m., in the same place.

January 10, 1956

Filed motion of Union Electric Company to dismiss as to F. A. E. Gillmor, and joinder by other defendants. (R. 123)

January 11, 1956

Filed order of Special Master Doerr that motions to dismiss will be heard on January 16, 1956. (Said order is set out below.)

It is ordered that the motions to dismiss filed on January 10th, 1956, made by defendant Union Electric Power Company and joined in by all of the other defendants, shall be heard at room 725 Davenport Bank Building, Davenport, Iowa, on the 16th day of January, 1956, at 2:00 o'clock p.m.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

January 11, 1956

Filed order of Special Master Doerr re depositions of Carl J. Mitzner, Harry Imel and P. H. Naber to be taken on January 16, 1956. (Said order is set out below.)

Pursuant to notice heretofore given and in conformity with my prior orders and orders of the Court, it is ordered:

1. The deposition of Carl J. Mitzner shall be taken commencing at 11:00 o'clock a.m. on January 16, 1956.

2. The deposition of plaintiff Harry Imel shall be taken commencing at 1:00 o'clock p.m. on the same date.

3. The deposition of plaintiff P. H. Naber shall be taken commencing at 2:00 o'clock p.m. on the same date.

All of such depositions shall be taken at Room 725, Davenport Bank Building, Davenport, Iowa.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

January 16, 1956

(Abstract of deposition of Carl J. Mitzner and Harry Imel held January 16, 1956.) Pursuant to the order of the Master, Carl J. Mitzner appeared before Michael T. Organ, Special Commissioner to take depositions, at 11:00 a.m., in Room 725, Davenport Bank Building, Davenport, Iowa. The plaintiffs appeared by their attorneys of record and all of the defendants appeared by one or more of their attorneys of record. There were also present as observers A. L. Elston and Glenn Elston. The Master called the meeting to order for recital of appearances. James R. McManus and X. C. Nady appeared for plaintiffs. The following proceedings occurred:

"MR. McMANUS: I appear on behalf of the plaintiffs, and I want to reurge the objection to the proceeding and to the validity of the Order made appointing the Special Master on the grounds heretofore urged with

respect to the violation of the Fifth Amendment and the Seventh Amendment to the Constitution of the United States, and the plaintiffs and counsel of record contend this is not a case for the appointment of a Special Master under the rules. There are no complicated issues within the meaning and intent of the Rules of Civil Procedure, no special circumstances, and the Order appointing the Special Master constituted an abusive (sic) discretion upon the part of Judge William F. Riley, the judge who made the appointment of the Special Master in this case, and we repeat and reurge those objections which we have heretofore made to appearing and proceeding before the Special Master for those reasons.

THE MASTER: The objection will be overruled. Your participation in the subsequent proceedings here will be without prejudice to that objection."

Carl J. Mitzner, after having been first duly sworn by the Commissioner, testified: I reside at Tipton, Iowa; my only business is farming and participating in Boy Scout activities and "things of that kind"; other than time spent in service, I have farmed all my life; my farming operations are in Cedar County, Iowa; I look after another farm or two and am interested in one farm in Delaware County, Iowa; I am a member and am on the Board of Directors, and an officer of the First Iowa Hydro Electric Cooperative now and since it was incorporated in 1938; I am currently vice-president of that Cooperative; I also am a member of the Cedar County Cooperative Oil Company of Tipton, Iowa, the Maquoketa Valley R.E.A. Cooperative, and a small dairy cooperative in Delaware County; I am also a member of the Eastern Iowa Light and Power Cooperative and served as a director thereof from 1936 to 1938 and 1944 to 1945 (18 months); I have read the complaint but hesitate to say that I understand it. (Tr. 9-13, 152, Mitzner deposition) Mr. Strong has the records. Repeatedly we have delegated him as our manager and representative in these things. So much of the time I was not present at even a few of these hearings. When I made those trips and participated it always meant I would have to leave a farm or maybe two farms in charge of someone else to do that.

Mr. Mitzner further testified that he was one of the individual plaintiffs; that he assumed, as a member of the Cooperative and one of its directors, he would have to stand behind everything that was furnished as evidence by Mr. Strong through his deposition. (Tr. 24, Mitzner Deposition)

Mr. Mitzner further testified that he made some contributions in money and time to the Cooperative; that he gave the money to Mr. Strong; that Mr. Strong at all times took care of the money affairs of the Cooperative, (Tr. 42, Mitzner Deposition) and that Jake More had been retained in an advisory capacity, but as he recalled it he had been notified that the Cooperative no longer was retaining his services. (Tr. 43-44, Mitzner Deposition)

Following the noon recess the hearings were again resumed at one o'clock p.m., with the same attorneys of record as at the morning session, and with the same observers. The deposition of the plaintiff Harry Imel, by agreement and order of the Master, was recessed until 10:00 a.m., January 17, 1956, at the same place.

Carl J. Mitzner resumed the stand and he further testified that Mr. Harry Strong, Harry Imel, Pete Naber, Frank Gillmor and himself constituted the directors of the Cooperative; (Tr. 62, Mitzner Deposition.) and that since the organization of the Cooperative, Strong had acted as General Manager and Gilmore, except for a short period, had acted as President. (Tr. 63-64, Mitzner Deposition)

The witness said that he had attended one or two of the hearings before the Federal Power Commission, that he had not accompanied other members of the Cooperative or its attorney on trips to New York or Chicago in connection with financing, but he did not believe he contributed to the answer to the interrogatories filed by defendants, and that he was not familiar with the interrogatories or the answers that were made thereto. (Tr. 101 through 104, Mitzner Deposition)

The witness further testified that there were no regular financial statements of the First Iowa Hydro [illegible] (Tr. 118, Mitzner Deposition). He also stated that he had not talked to any bonding house or a representative of a bonding house about the financing of the project (Tr. 129, Mitzner Deposition), and that Mr. Harry Strong had control of the

spending for the First Iowa Hydro Electric Cooperative (Tr. 130, Mitzner Deposition), and that he had no idea as to the amount of money that had been raised by the Cooperative and that no audit was ever made of Mr. Strong's records, to his knowledge. (Tr. 131, Mitzner Deposition)

He said that Mr. Harry Strong had the original conception of the idea of the formation of the First Iowa Hydro Electric Cooperative, and that he has been the moving force in the Cooperative. Strong was the one who negotiated and took care of the business affairs, and that much of the information he had in connection with the law suit came from Harry Strong or others. (Tr. 145-146, Mitzner Deposition)

With reference to his testimony in this proceeding the following questions were asked and answered, to-wit:

"Q. During the course of your meetings, your Board meetings, have you discussed between yourselves the question of your testimony here at the depositions?

"A. Not specifically, I would say. I would say we did yesterday, yes; otherwise not.

"Q. Have you discussed in that connection the matter of whether or not you would testify?

"A. Yes.

"Q. And what have you been advised in that connection?

"A. By Mr. Strong, yes.

"Q. Have you been advised by anyone else?

"A. Yes. I would say advised, or at least have had suggestions offered, yes.

"Q. From whom did these suggestions come?

"A. Well, I could say Mr. Elston, for instance. We have talked it over, at least. Mr. Hakes, I guess. I have talked it over with him; and of course, as I said, the five of us directors met and we talked it over. And as I have disclosed to you, I have not followed exactly the line that Mr. Strong suggested, but nearly so.

"Q. And at that time did you discuss between yourselves the advisability of your testifying or refusing to testify?

"A. Yes.

"Q. And you were advised in that connection by Mr. Strong?

"A. Yes.

"Q. What was that advice?

"A. Well, he suggested that I probably stand on my Constitutional rights to refuse, because I did not have counsel."

(Tr. 159-160, Mitzner Deposition)

The witness further testified that the records of the First Iowa Hydro Electric Cooperative have always been kept and maintained by Mr. Strong and he assumed that these records were in the home of Mr. Strong; and that by and large Mr. Strong was the man running the show and he made his reports about his activities. (Tr. 167, Mitzner Deposition)

By agreement Mr. Mitzner's deposition was recessed to the resumed at a date later to be ordered or agreed upon. (Tr. 170-171, Mitzner Deposition)

Whereupon the proceedings were recessed until 9:00 a.m., January 17, 1956, for the deposition of Mr. Harry Imel. (Tr. 172, Mitzner Deposition)

On January 16, 1955, pursuant to the former notices and orders, Mr. Harry Imel and Mr. P. H. Naber appeared for the taking of their depositions at Room 725 Davenport Bank Building, Davenport, Iowa. The same appearances were noted as in the case of the Carl J. Mitzner deposition earlier that same day. Mr. McManus urged the same objections, without repeating them, as he urged with respect to the taking of the Mitzner deposition, which objections were then overruled by the Master. Thereupon both Mr. Imel and Mr. Naber were sworn and indi-

cated their willingness to give testimony, and Mr. Imel's deposition was recessed until 9:00 a.m., January 17, 1955, and Mr. Naber's deposition was recessed subject to call. On January 17, 1955, Mr. Imel appeared and testified as follows:

My name is Harry Imel, I-m-e-l. I reside at Muscatine, Iowa. and have been engaged in the grain and feed business as a Broker since 1927, and currently am on the road most of the time. I lived in Indiana until 1941, when I moved to Muscatine, and I still have farming interests in Indiana. Since moving to Muscatine I have had minor farming interests in, connection with Mr. C. C. Hakes and Mr. Naber. I am a director of the First Iowa Hydra Electric Cooperative and a plaintiff in this litigation. I have no familiarity with the engineering aspects of the cooperative's project and my familiarity with the financial arrangements are in a "broad sense"—"Well, I know the line of business that a person would have to go through; that is, down the line, to finally be at the point of constructing this project." (Tr. 7-11, 70-72, 80-85, 88-89, 148-152, 189, Deposition of Harry Imel) Mr. P. H. Naber, with whom I share farming interests, also shares farming interests with Mr. C. C. Hakes. (Tr. 82, Deposition of Harry Imel) I knew nothing of Harry Strong's educational background, banking or accounting experience, or his political, professional, or philosophical activities, and my only knowledge of Strong's business experience in financing cooperatives and hydro electric projects has been acquired in connection with the First Iowa project. (Tr. 127-131, Deposition of Harry Imel)

Mr. Harry Strong organized the First Iowa Hydro Cooperative. During the period that I have been on the board of directors Mr. Harry Strong was the actual moving force of the project. I think the board of directors kind of believed in him. We knew what he had been doing and left it up to him. He is the only one who has devoted his full time to the First Iowa Hydro Electric Cooperative. He would make reports to the board and we would accept those reports. He managed everyth... (Tr. 19, Deposition of Harry Imel.) I have made periodic contributions since I became a member, about 1946 or '47, I would guess somewhere between Three and Ten Thousand Dollars. During this period we have had periodic financial reports from Mr. Strong as to the finances of First Hydro. These were on legal papers setting out all the prior donations. As to

expenses, he gives us a report after a fashion. We have never asked him to set up a form. I have never seen his reports as to expenses. He simply recites or reads them to us. (Tr. 40-41, deposition of Harry Imel)

I didn't personally contact any of the banking houses that turned down our financing, and the reason I didn't was because that was Mr. Strong's job and like I say, we put our confidence and our trust in him. (Tr. 52-53, Deposition of Harry Imel.) The expenditures were reported after it had been spent and I never heard the board reprimand Mr. Strong for the way he conducted it and the handling of the affairs from the financial standpoint. We never had an audit we didn't think it was necessary. We had no set dates for reports. I don't think the First Iowa Hydro Electric Cooperative had a bank account. I couldn't say exactly how much Strong kept the funds. I wouldn't say that he deposited all the funds. The board knew pretty well what Mr. Strong was doing. (Tr. 90-93, Deposition of Harry Imel)

With further reference to the matter, the witness testified as follows:

"Q. Are you speaking about expenses of the Cooperative, or expenses of Harry Strong, personally?

"A. Harry Strong was the general manager of First Iowa, and he spent 100 percent of his time working at the business, and naturally he had to live, and our contributions went for the promotion of First Iowa.

"Q. Do you mean then that the money paid to the First Iowa was used by Harry Strong personally?

"A. Was he privileged to live out of it, pay the expenses, is that what you mean?

"Q. Yes.

"A. Yes:

"Q. Did he do so?

"A. I think he did."

(Tr. 94-95, Deposition of Harry Imel.)

I would have to check the records before I could answer about any arrangements made by the board for the payment of Harry Strong's personel expenses. I wouldn't say if there were no minutes in the records that there was no agreement. I would say—like I told a while ago—we fellows on the board had confidence in Harry Strong, and he has reported to us as to expenditures, and all. (Tr. 97, Deposition of Harry Imel)

(The deposition of Harry Imel was resumed at 1:30 p.m., on January 17, 1956, with attorneys of record appearing as noted at the morning session, and additionally a Mr. A. L. Elston was present as an observer.)

Mr. Strong was and is the guiding force of the First Iowa Hydro Electric Cooperative, and he is the General Manager, Secretary and Treasurer. I have known Mr. Strong since 1947, and during all that time he has lived at 1011 East High Street, Davenport, Iowa. (Tr. 124-126, Imel Deposition.) Mr. Frank Gillmor is President of the Cooperative. I think before him there was a man by the name of Ray Norris who was President. (Tr. 141, Deposition of Harry Imel.) I am not familiar with the present indebtedness of the Cooperative and wouldn't know the amount of its indebtedness. (Tr. 143, Deposition of Harry Imel.) I have no independent knowledge, outside of the record, of anything filed or produced in this case. (Tr. 145, Deposition of Harry Imel.) It has always been my understanding that our plan and proposal for the financing and construction of the First Iowa Hydro Electric Cooperative depended exclusively on obtaining 100% financing from other sources and by way of the sale of bonds. (Tr. 150, Deposition of Harry Imel)

At this proceedings the Special Master entered the hearing room and reported that he had prepared a supplemental report as Special Master that was ready for filing, and arrangements were made to have it filed with the Clerk and the copies received and then delivered to the attorneys of record for the parties during the proceedings. He further reported that he had talked to Judge Riley on the telephone, and that he was willing to hear the supplemental report on January 20, 1956, at the same time as the report which the Master had filed earlier.

At this point the master again entered the hearing room and a discussion was had with reference to the recessing of the taking of the depositions in view of the fact it now appears that it

would be impossible to complete the deposition of Mr. Imel. Following a discussion it was agreed that the taking of the depositions of the plaintiffs Imel, Mitzner and Naber would be recessed until the further call of the Master at the conclusion of the proceedings today.

At this point there was distributed to Mr. McManus and Mr. Nady, as attorneys of record for the plaintiffs, and to attorneys for the defendants present, the notice and supplemental report of the Special Master filed today and each acknowledged that they had received a copy of the notice dated today and signed by the clerk, and a supplemental report of the Special Master also filed on this date. (The examination of Mr. Imel then continued.)

I know Johnny Kerwin. I have been in his presence along with some of the rest of the members. He was consulting with me in regard to the case. Mr. Kerwin was not employed by me. I don't know if he represents personally any of the other members of the Board. He was assistant to Mr. Strong. Harry Strong is the manager, and I suppose Mr. Kerwin would be assistant manager. I wasn't present when these arrangements were made. I don't know whether he served in a legal capacity or in a management capacity. I don't know what the arrangements are for fees or salary. I was not present at the meeting when he was elected. It has only been in the past few months or so. It is not of long standing. Mr. Kerwin lives in Rock Island. He is a practicing attorney. (Tr. 194-197, Deposition of Harry Imel)

The witness P. H. Naber was sworn but did not testify.

The hour having arrived for adjournment, the deposition proceedings were recessed as per the prior agreement, subject to the call of the Master. (Tr. 223, Deposition of Harry Imel.)

January 16, 1956

Filed order that motions to dismiss are granted as based upon Div. I, upon Div. III, Subdivision I, and upon Div. IX, Subdivisions 1 and 3; motions to dismiss are denied as based upon Div. II, upon Div. III, Subdivision 2, and upon Div. IV, Subdivision 2, without prejudice to renewal of motion to dismiss; motion to assess costs against plaintiffs is denied without

prejudice to its renewal; as per Para. 1 above, action is dismissed as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits, provided that such dismissal is expressly made subject to confirmation by the Court, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and attorneys for defendants.) (R. 128)

January 17, 1956

Filed supplemental report of Special Master Doerr. (R. 131)

January 17, 1956

Filed Exhibit A to supplemental report of Special Master Doerr. (Tr. of proceedings on the deposition of F. A. E. Gillmor)

January 17, 1956

Filed order for hearing on supplemental report of Special Master Doerr to be held in Des Moines, Iowa, on January 20, 1956, at 9:30 a.m., Riley, J. (Copies mailed to all plaintiffs and attorneys of record.) (Said order is set out below:)

It appearing to the court that Edward A. Doerr, Special Master, has filed his Supplemental Report (to that filed herein on January 4, 1956) of dismissing this action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, of which the former is an officer and director, because of the failure and refusal of said F. A. E. Gillmor to testify as a witness at the taking of his deposition pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure scheduled to be taken at Davenport, Iowa, on January 10, 1956, at a time and place at which the said F. A. E. Gillmor was present in person;

And it further appearing that following such refusal of the said F. A. E. Gillmor so to testify, the defendants filed herein their motion to dismiss based in part upon said refusal and upon the failure of said F. A. E. Gillmor and First Iowa Hydro Electric Cooperative to pay into the registry of the court certain money in accordance with the orders of the court dated September 21, 1955, and September 27, 1955;

IT IS NOW ORDERED that the Supplemental Report of the Special Master shall come on to be heard before the court at Des Moines, Iowa, on the 20th day of January, 1956, at 9:30 o'clock a.m., together with other matters in this cause assigned for said time and place, and that notice of the hearing on said Supplemental Report shall be served upon the plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative personally by the Marshal, and that notice of said hearing shall be given by mailing to the other individual plaintiffs and their counsel of record and to counsel for the defendants a copy of this order.

January 17, 1956

Mailed notice with copy of supplemental report of Special Master attached to all plaintiffs, their attorneys of record and attorneys of record for defendants, setting date for hearing on supplemental report at Des Moines, Iowa, on Friday, January 20, 1956, at 9:30 a.m.

January 19, 1956

Filed petition of plaintiffs for review of an order made by Special Master on January 16, 1956. (R. 137)

January 19, 1956

Filed plaintiffs' exceptions and objections to report of Special Master filed January 4, 1956. (R. 134)

January 19, 1956

Filed plaintiffs' objections and exceptions to supplemental report of Special Master filed January 17, 1956. (R. 138)

January 19, 1956

Filed plaintiffs' motion to vacate order appointing Special Master. (R. 138)

January 20, 1956

(Abstract of proceedings before Riley, J., re defendants' motions to dismiss; the report of the Special Master of January 4th and of January 17th; plaintiffs' petition for review of the orders of the Special Master; objections and exceptions thereto; motion to vacate order of reference, and defendants' motion to strike plaintiffs' motion to vacate.)

Mr. J. R. McManus, Allan R. Shepherd, James D. France and Xavier C. Nady, attorneys of record for plaintiffs, were present and one or more of the attorneys of record for the defendants.

The Court announced that this was a hearing pursuant to his orders of January 9 and 17, 1956. The Court asked if there were any of the individual plaintiffs present or any officer of the corporate plaintiff, or anyone representing the corporate plaintiff other than attorneys of record who appeared at the counsel table. There was no response and the Court then requested of Mr. McManus that if any of the individual plaintiffs appeared or if any representative of the corporate plaintiff or any of the corporate plaintiff's officers or directors appeared that he call it to the attention of the Court. (Page 2, Tr. of January 20, 1956, proceedings)

The Court announced that he had for submission the motion of Union Electric Power Company, of October 11, 1955, Division I of which relates to the refusal of Strong to testify in the discovery proceedings and leaving the hearing room, and Division 2 of the motion having to do with the failure of all plaintiffs, corporate and personal, to make the deposit ordered by the Court. The Court then inquired as to whether or not the deposit had been made this morning and Mr. McManus replied that it had not been made to his knowledge, and that both of these matters were joined in Division 3; that the Court also had for consideration the report of the Special Master of January 4, 1956, and the Special Master's Supplemental Report of January 17, 1956, which had to do with the refusal of the plaintiff Gillmor to testify, and the petition for review of all the plaintiffs, filed by their counsel.

Mr. McManus stated that they had a petition for review of each of the orders of the Special Master; that they had also filed objections and exceptions to each of the reports, the

original report and the supplemental report, and in addition to that, yesterday (January 19, 1956) they had filed a motion to vacate the order of reference. The question as to whether or not the motion to vacate would be submitted at this time or postponed for a later date, the Judge announced that he would not expect the defendants to be in a position to submit it without further notice.

Thereupon Mr. Walker, on behalf of defendants, made an opening statement and argument on behalf of defendants. In connection therewith, the following proceedings occurred: (Tr. 8-24, Proceedings of January 20, 1956)

> "MR. WALKER: At the outset of my remarks, and through an abundance of caution, while we think that it is probably not necessary, there is some question in connection with the order of the Special Master so far as it relates to the failure of the plaintiffs to make the deposit of $2,500 which was required by the order of the Court of September 21st and the order of September 27th. That being true, and if there is any question in that connection as to whether or not the defendants should move in respect to the Master's order in that connection, I want to make a record here that we move that the Master's report in connection with the dismissal of the plaintiffs in connection with their refusal or failure to pay the $2,500 to the Receiver be set aside and that the Court decide that question at this time.
>
> THE COURT: I believe his order was without prejudice to the right—
>
> MR. WALKER: It was, sir. And I want it considered as renewed as of this time.
>
> THE COURT: Very well, it will be so considered."

Mr. McManus, as attorney for plaintiffs, and preparing to address the Court, raised the question again of the submission of the validity of the order appointing the Special Master. The Court stated, however, that it had been raised in his petition for review and that he was at liberty to discuss the same. The Court then made the following statement and the following record was made in reference to the proceeding in chambers

before the appointment of Mr. Cook as Special Master, in May of 1955, as follows:

"THE COURT: * * * * * Now, another thing perhaps should be said by the Court before you begin so that you may have an opportunity if you desire to discuss it because it is a matter that is not of record, and in making the statement I am relying on the memory of the Court, and that refers to a conference in my chambers in May, 1955 before the appointment of Mr. Cook as Special Master. Attending that conference were the four counsel of record for the plaintiff, and Mr. Walker.

"Mr. Walker, I just said to Mr. McManus before he proceeds I wanted him to know that the Court's recollection is, and I think it should be a matter of record, that I recall a conference in my chambers in May, 1955. I can't give you the exact date. It was attended by counsel of record for the plaintiffs and yourself, at which Mr. Holm, my law clerk, and I were also present, and at that time I informed counsel of my desire to appoint Mr. Cook as Special Master, and I called the attention of counsel for the plaintiffs to Mr. Cook's prior employment in years gone by by Iowa Southern Utilities, and I know by Iowa-Illinois Gas & Electric Company, but I said that because of my own knowledge of his objectivity, my long acquaintance with him as a splendid lawyer, his knowledge of the federal rules, and my desire to have him handle the questions that might arise in relation to these depositions to be taken, I wanted to name him Special Master. And I believe it is you, Mr. McManus, who suggested that you would like to confer with your co-counsel and you retired to my library where you had a brief conference, and came back and said the appointment of Mr. Cook would be very satisfactory.

"MR. McMANUS: That is correct, your Honor.

"THE COURT: I mention this only that if may be in the record, and you may to the extent you desire refer to it. That is all. You may proceed."

(Tr. 26-27, Proceedings of January 20, 1956)

The following further occurred when Mr. McManus stated:

"* * * I also want to call your attention to the fact that the conduct of Mr. Strong is his conduct. He is only one of four individual plaintiffs in the litigation. It is true that Mr. Gillmor followed his lead. The other three plaintiffs have appeared before the Special Master and have either testified in part, and that is true as to Mitzner and Imel, or have been put under oath and signified their intention of testifying, and that is true as to Mr. Naber, whose testimony was not taken but who did appear and was administered the oath and indicated his intention to give testimony.

"THE COURT: Isn't it true that Mr. Strong in addition to being director is its secretary-treasurer?

"MR. McMANUS: He is secretary-treasurer and general manager of the Cooperative.

"THE COURT: And that Mr. Gillmor, I believe, is president?

"MR. McMANUS: He is the president. That is correct, Your Honor.

"Now, it would seem to us that there are other methods of sanctions and other methods of describing the situation besides imposing the drastic sanction of dismissing the case as to the First Iowa Hydro Electric Cooperative and all the other plaintiffs.

"THE COURT: Well, let us have the first suggestion as to Mr. Strong. What would there be?

"MR. McMANUS: I will have to confess that I myself am unable to explain or to justify Mr. Strong's conduct on any reasonable or rational basis. I have not talked to Mr. Strong since the 31st day of August of 1955. As everybody knows in this room, there has been a dispute between counsel of record and the plaintiffs in this case, especially Mr. Strong, but recently that situation has changed with respect to Mr. Imel, Mr. Mitzner and Mr. Naber, so that Mr. Mitzner and Mr. Imel and Mr. Naber have counselled with us this week as late as Tuesday, and

apparently Mr. Strong is going down the same line that he has gone all along, by himself, but it has become increasingly apparent that the other directors are getting next to Mr. Strong, shall we put it.

"THE COURT: But I am interested in the other means that you suggest in handling it, and that is the reason I ask what about handling the problem as to Mr. Strong?

"MR. McMANUS: The Special Master, Your Honor, as I understand the law, possesses no power to commit a person for contempt of court. That is only a power vested in the district judge, so that the only sanction that he could apply on the motion and the record that was made before him was to sustain or recommend the sustaining of the motion to dismiss filed by the defendants because of his refusal and failure to testify, and his failure and refusal to put up the $2,500.

"Now, in a discussion of this kind I must be fair and honest and frank with the Court, that I am of the opinion that at all times they had the money to put up the $2,500, so that I don't know of any justification or excuse for the failure and refusal of First Iowa Hydro Electric Cooperative to make the $2,500 deposit into the registry of this court under the order that the Court has made, and I don't intend to attempt to justify that because the records of this court show that during the bankruptcy proceeding they produced in the neighborhood of $5,000. * * *" (Tr. 33-36, Proceedings of January 20, 1956)

Further proceedings were had as follows:

"MR. McMANUS: Yes. All right. Now, another question that I want to call Your Honor's attention to, and which was presented to Your Honor in connection with the brief that we filed last fall when the plaintiffs attempted to remove their present counsel and substitute other counsel, and that is this proposition—that the record in this court is without contradiction or dispute that these attorneys of record for the plaintiffs have an interest in the subject matter of this suit by reason of the contingent contract of employment and the nature of their contract of employment, and the work and time and effort they

have expended in this case, and we cited authorities to Your Honor, and I know Your Honor is familiar with them because you discussed on one occasion one of them with me which I believe was a District of Columbia case which held that the lawyers could appeal and had the right to appeal regardless of an attempt on the part of plaintiff to get other counsel, so that if this case were dismissed it deprives the attorneys for the plaintiffs, who are blameless and who are without wrong and who have to the best of their ability attempted to represent their clients in this proceeding, and penalizes them in a situation where they are helpless. We have advised all of these plaintiffs to testify and have requested them to testify, so that if this case is dismissed it penalizes the lawyers who are innocent of any wrongdoing. I, myself, will not attempt to explain or to justify or to excuse the conduct of Mr. Strong. Mr. Gillmor is a very old man who is under the domination of Mr. Strong and who is being led by Mr. Strong. If left to his own devices I am certain that Mr. Gillmor would do what was right. He is a high minded old gentleman possessed of his ideals, but he is being influenced and led by Mr. Strong, so that Mr. Strong by his wilfull conduct is penalizing the other four directors and the attorneys of record for the plaintiffs, so that I ask the Court to devise some means to keep the lawsuit in court in order to afford us time and opportunity to try to get the situation straightened out.

"THE COURT: Well, I would be glad to have the benefit of your suggestion, because the purpose after all is to get the testimony of Mr. Strong. He has been guilty of contumacious conduct as one could possibly be guilty of.

"MR. McMANUS: I agree with Your Honor.

"THE COURT: And if you can tell me how that can be accomplished I would be glad to have you suggest it. The Court doesn't like to have to use such drastic remedies. For example, in connection with the bankruptcy proceedings, as you know he was directed to turn over to the Receiver certain funds in his hands, and he defied the order of the Court and I had to direct his commitment until he obeyed the order of the Court. When that occurred he obeyed it.

"MR. McMANUS: I am told that at the hearing which occurred on December 20th when he again refused to testify, that on that occasion he wanted to know of counsel if he would be committed for contempt, if any attempt would be made to commit him for contempt if he failed to and refused to testify. When he felt that he would not be committed for contempt he then refused to testify, so that that is a matter which Your Honor might properly consider. Furthermore, the appeal of the cases of this kind is expensive for everybody concerned. It might be that if Your Honor saw fit in the interests of justice and in attempting to safeguard the rights of the other people who are interested in the case that I have mentioned, might see fit on your own motion to make an order giving Mr. Strong and Mr. Gillmor another opportunity to testify if Your Honor thinks that is proper in the due administration of justice.

"THE COURT: I would not consider this procedure when I look at the record of continuances that were granted at the request of Mr. Strong, and then his ultimate conduct. I can see nothing to be accomplished by that.

"MR. McMANUS: Now, Mr. Gillmor appeared before the Special Master last—a week ago last Monday and at that time refused to testify, and immediately the motion was filed and notice was given and it was set for hearing for Monday of this week, and Mr. Gillmor was not afforded any other opportunity to testify except the one, although he was aware of the consequences that had occurred to Strong by reason of his failure to testify, but it might be that if Mr. Gillmor was afforded another opportunity to testify that he might do so although I have not talked to him, Your Honor, and I wouldn't be able to assure the Court that he would do so.

"THE COURT: Very well." (Tr. 38-40, Proceedings of January 20, 1956)

The proceedings were recessed until 11:30 a.m., at which time counsel for defendants announced to the Court that they would agree that the hearing also encompass plaintiffs' "Motion to Vacate Order Appointing Special Master," filed January 19th, and thereupon defendants orally moved to strike the

motion because it was not timely filed and not filed within the time that such a motion should have been filed, either at or near the time of the appointment of the Special Master, and that it has not been filed timely thereafter. That the plaintiffs here have consented to the appointment of the master; that plaintiffs have further waived any right to make such a motion at this time and after the development of the case to this point without previously having made such a motion, and by reason of the fact that they have also invoked the authority of the master, proceeded under the master, have asked for extensions of time, relief and various other matters under the master, and have proceeded at all times under the jurisdiction of the master, and that the plaintiffs have by their actions and failure to file this motion within the time required acquiesced in the appointment of the master; and we therefore move that this motion be dismissed for the foregoing grounds. (Tr. 44-45, Proceedings of January 20, 1956)

Thereupon Mr. Maxwell A. O'Brien argued the motion to strike to the Court.

With further reference to the conference of May 16, 1955, previously referred to, the Court stated of record as follows:

> "THE COURT: I will interrupt you just long enough to say that my secretary's diary discloses that that conference took place on the 16th day of May, 1955, attended by Mr. Steele, Mr. McManus, Mr. O'Brien, Mr. Walker, Mr. Waterman, Mr. Bergstrom, Mr. Nady, Mr. France, and Mr. Shepherd. There was such conference. If there was a later one than that I don't have a note of it here."
>
> (Tr. 47, Proceedings of January 20, 1956)

In the argument to the Court Mr. Nady had expressed his opinion to the effect that a majority of the five-man Board of Directors of the First Iowa Hydro were not in agreement with the refusal of the President, Mr. Gillmor, and the Secretary-Treasurer-Manager Strong in refusing to testify, both of said parties also being directors. (Tr. 42, Proceedings of January 20, 1956)

In the reply argument Mr. Waterman, for the defendants, asked leave of the Court for permission for Mr. Shuttleworth,

also one of counsel for defendants, to read into the record certain statements from the deposition of Mitzner and the deposition of Imel, individual plaintiffs and directors of First Iowa Hydro, to refute the opinion expressed by Mr. Nady, Counsel of plaintiffs. The following thereupon appears in the record, to-wit:

"THE COURT: Well, I am supposed to take judicial notice of it but it will clarify it very readily if you will read it.

"MR. WATERMAN: These depositions were taken subsequent to the order for this hearing.

"MR. SHUTTLEWORTH: May it please the Court. These are short. I should like to read into the record from Volume 1 of the deposition of Carl J. Mitzner, taken last Monday, January 16, 1956, the statement of the plaintiff Mitzner appearing and starting on page 17 of that transcript.

" 'Because of the position that I have taken here in signing these papers, discharging our attorneys as of record, and the various documents that have followed as a natural course of that, I feel I am without counsel, and the question you have just asked, Mr. Walker, I would very much—what shall I say?—hesitate or dislike answering it without counsel.

" 'Now, if the Court should see fit to permit me to procure other counsel and give me time to prepare myself, then I think possibly I could answer questions.

" 'I would say this to you gentlemen here, and the Court, the depositions which you have taken from Mr. Strong are so much more—what shall I say?—relevant to the lawsuit in process than any information which I can supply, that I feel that you are wasting both your time and mine in merely questioning me.

" 'I presume it is a legal and proper move, but one with which I am not acquainted, and being a farmer, I just think as a farmer. There are many times when I must husband my time very carefully to get done the things I have to do, and this has led me to this kind of thinking.

" 'Mr. Strong has the records. Repeatedly we have delegated him as our manager and representative in these things.

" 'So much of the time I was not present at even a few of these hearings.'

"MR. SHUTTLEWORTH: And then he goes on, but I have concluded at the bottom of page 18.

"THE COURT: In the portion from which you read was he represented by counsel at all?

"MR. SHUTTLEWORTH: Counsel of record were there at that time and place, Your Honor.

"THE COURT: And did they participate in the record that was made following what you have read?

"MR. SHUTTLEWORTH: Yes, they did.

"THE COURT: Very well. Now go ahead with your other.

"MR. SHUTTLEWORTH: I would like then to refer to the testimony of Mr. Harry Imel in his deposition taken Tuesday, January 17, 1956. At page 8 of this deposition I would like to read the following questions and answers:

" 'Q. How long have you been a Board member?

" 'A. I think it was in 1953. The records show—I think it was in January, 1953. I came on as a director.

" 'Q. And that was the first time you had acted in the capacity as a director?

" 'A. As a director, yes.'

"MR. SHUTTLEWORTH: Then I should like to read the transcript of the deposition at page 19 of Mr. Imel:

" 'Q. Well, that reminds me of a question I wanted to ask you, Mr. Imel.

" 'Harry Strong organized the First Iowa Hydro Electric Cooperative, did he not?

"'A. I think that happened, Mr. Walker, before I came to Iowa.

"'Q. Do you know that, though, to be a fact?

"'A. I believe that he did. I believe in conversations that I have had with the various people in the past that Harry Strong was the one that organized First Iowa.

"'Q. During the period that you were on the Board of Directors of the First Iowa Hydro, was Harry Strong the actual moving force of the project?

"'A. Yes, in this respect: I think the Board of Directors kind of believed in him. We know what he had been doing. We have left it up to him.

"'Q. Mr. Strong has been the only man who has devoted his full time to the First Iowa Hydro Electric Cooperative?

"'A. To my knowledge, yes.'

"MR. SHUTTLEWORTH: Thank you, Your Honor.

"THE COURT: Very well, you may proceed, Mr. Waterman." (Tr. 52-55, Proceedings of January 20, 1956)

It appeared and was noted of record that at the close of the proceedings before the Court none of the plaintiffs had appeared in person, and that no officer or director of the plaintiff Cooperative had appeared. (Tr. 62, Proceedings of January 20, 1956) At the conclusion of the arguments the Court commented upon the matters submitted as follows:

"Well, gentlemen, I regard as submitted the matters covered by my orders of January 9 and 17. I think I should say at this time that I have been dealing with some of the matters that were covered by the chronology of Mr. Waterman and of other counsel for a good many months. We go back, as a matter of fact, to the commencement of the lawsuit, but I mean with the matters in which I think were involved what I can only describe as the contumacy of the plaintiffs Strong and Gillmor and their complete disregard for the orders of this Court.

"I have been kept informed by the master of the progress of these hearings. This is not a matter of first impression with me today. The whole matter has had long consideration, and I confess that there has been considerable concern on my part, as the judge who happens to occupy for a brief period a position of judge in the Southern District of Iowa, as to what the effect might be of conduct such as this in the administration of justice here in the Southern District. I believe I have gone a great deal further than as a practicing lawyer I would have considered it my obligation as a judge to do because I didn't want any hardship to result as far as anyone was concerned, and I wanted to give every opportunity to all litigants involved to have a fair and full opportunity to have their rights protected. I say perhaps I have gone further than I should. Nevertheless, I have no apologies for what I have done from the time that the first action was taken by the plaintiff Strong that began to show a disregard for the orders of this Court. He has been acting with increasing provocation, and his conduct has been definitely contumacious.

"Unfortunately, when I came to the matter of the bankruptcy proceedings, which are unrelated to this proceeding, the proceedings affecting the corporate plaintiff here, I found it necessary to commit Mr. Strong to jail to make him obey the orders. He obeyed them promptly. He has shown flagrant disregard for orders of the Special Master. He has secured continuances, and I can only infer now that they were not obtained in good faith because it is evident from the record that he didn't intend to testify. At least that is the conclusion that I draw.

"I appointed Mr. Cook as Special Master with full knowledge on his part, on the part of his associates and his counsel of matters that I referred to earlier in the record this morning, and yet the first time that there was a difference between Mr. Cook's order and what Mr. Strong desired to do, which had to do with these very funds about which counsel spoke in oral argument, and from which time apparently the trouble has stemmed, plaintiffs were in this court with an attack on Mr. Cook that I considered very unwarranted, very unfortunate for

such a respected member of this bar. Later when a conflict of interests developed that he had not anticipated at the time of his appointment, he asked me if he might resign. He tendered his resignation and I appointed the present Special Master, Mr. Edward A. Doerr. I don't recall whether it was before or since that time that an effort was made to disqualify me; and there have been two trips made to the Circuit Court of Appeals in connection with this matter. None of those things have given me the least feeling one way or the other. I still am as eager to protect the rights of all of the plaintiffs in this case as I am to protect the rights of all of the defendants, and to protect the rights of counsel for plaintiffs as those of counsel for the defendants. I consider it my duty as a judge.

"Now, as to these matters, I entered an order on September 21st at the time of the appointment of Mr. Doerr, directing parties plaintiff and part of parties defendant each to deposit in this court—pay into the registry of this court $2,500 to defray the expenses of the Special Master. The defendants made such payment. The plaintiffs haven't up to this time, although the record as offered here this morning, and as disclosed in the bankruptcy proceedings, of which I must take notice, indicate that the corporate plaintiff had more than that amount of money in its possession since the order. I consider that as complete a disregard of the order of this Court as any of the other conduct of the plaintiff. So for that reason the motion should be sustained, and is sustained as to all of the plaintiffs.

"Now we come to the report of the Special Master, the one filed here under date of January 4, 1956 having to do with the refusal of Mr. Strong to testify. He was an executive officer, the manager, secretary and treasurer of the corporate plaintiff. I consider that portion of the order of the Master under date of December 22nd, and I quote from it—well, I will say first the dismissing as to the plaintiff Strong and the corporate plaintiff—and I quote from the order: 'Such dismissal to operate as an adjudication upon the merits.' I consider those words surplusage in his order because I don't think he has a

right to make that determination, but he may recommend to this Court, and I take his language as surplusage so far as an order is concerned, but as a recommendation to this Court that dismissal be of that character, and I sustain his order, approve his report and recommendation, and I consider the dismissal as to the plaintiff Strong and the corporate plaintiff to operate as an adjudication upon the merits.

"So far as his report of January 17, 1956 is concerned, which is a supplemental report dealing with the contumacious conduct of the plaintiff Gillmor, who is the president of the corporate plaintiff, and because of whose contumacy and disregard of the orders of the Master he recommended his dismissal, and I accept it only as a recommendation, as to the plaintiff Gillmor and the corporate plaintiff I approve his recommendation and adopt it, and I consider that this dismissal is to operate as an adjudication upon the merits.

* * * *

"Now, so far as the motion to the Court to vacate the order appointing the Special Master is concerned, I sustain the motion of Mr. O'Brien. I consider it not timely, and I consider that the failure of plaintiffs at the time of the appointment of the Special Master to move for a vacation of that order within a reasonable time thereafter—I mean to move the Court to enter the order, and who alone can vacate the order—is a waiver of their right to make such a motion at this time, and I deny them that right, and sustain the motion of Mr. O'Brien to strike this motion to vacate.

* * * *

With respect to the court costs, the Court further commented that the costs would be divided equally between the plaintiffs and the defendants, including all costs and the fees of both Mr. Cook, Special Master, as well as the fees of Mr. Doerr, Special Master. Thereupon the hearing was adjourned. (Tr. 80, Proceedings of January 20, 1956)

January 24, 1956

(Abstract of proceedings before Riley, J., re memorandum of decision and order for judgment.)

On January 24, 1956, the attorneys representing the defendants appeared in open court for a discussion with the Court regarding the proposed Memorandum of Decision and Order for Judgment. The Court announced that Mr. McManus had called before noon and talked to Mr. O'Brien concerning the form of the order, and that he had had no opportunity to look at it or would have none, and that he was reluctant to do so without the association of his other counsel. The Court continued by stating of record that Mr. McManus had informed him that he had talked to Mr. Nady, of Tipton, by long distance telephone, and that Mr. Nady could be here tomorrow morning at eleven o'clock, and I told him I would take the matter up at eleven o'clock. Under the circumstances and because of the importance of the matter, I felt that in fairness to them the opportunity should be afforded and consequently we will do that.

January 25, 1956

Filed retraction signed by Carl J. Mitzner and P. H. Naber. (Said retraction is set out below:)

The undersigned, being members and directors of the plaintiff First Iowa Hydro Electric Cooperative, and also plaintiffs in the above entitled cause each for himself hereby retract and withdraw each and every charge and accusation made by plaintiffs in a "Motion to Discharge Plaintiffs' Counsel of Record" filed in the above entitled cause by plaintiffs; and state that they have investigated the facts and find that all charges of misconduct and accusations derogatory of plaintiffs' counsel of record made in said motion or in any other pleadings filed or attempted to be filed that in any way reflect unfavorably upon said counsel were false, and that the undersigned are now convinced that the attorneys of record have loyally, honestly, and to the best of their ability served and represented plaintiffs in this case at every stage of the proceedings.

The undersigned further state that by reason of lies and misrepresentations which were made to them, upon which they relied, they were induced to sign the motion to discharge counsel, and they are now of the opinion that they should not have believed the statements and misrepresentations which were made to them, and that the same were unworthy of belief and untrue. The undersigned further state that had they not believed the lies which were told to them they would not have signed said motion to discharge their counsel.

The undersigned now state that they have confidence in the integrity of counsel of record for plaintiffs; that they believe that said lawyers have been guilty of no misconduct, and that in all matters connected with this litigation said attorneys have ethically conducted themselves in accordance with the highest standards of the legal profession. The undersigned desire to retain and continue in this litigation with their present counsel of record, namely, France, France and Nady of Tipton, Iowa, James R. McManus and Allan R. Shepherd of Des Moines, Iowa, and we desire that this court know that all charges made against said counsel by plaintiffs were baseless and without foundation in fact and are now convinced that said misrepresentations were ruthlessly manufactured by a person seeking to serve his own selfish ends and purposes.

CARL J. MITZNER,

P. H. NABER.

January 25, 1956

(Abstract of proceedings before Riley, J., re memorandum of decision and order for judgment.)

A further hearing was held pursuant to the order of the Court on January 25, 1956, at 11:00 a.m., for the purpose of allowing counsel for plaintiffs to make any objections and exceptions they might have to the proposed Memorandum of Decision and Order for Judgment. Mr. James R. McManus, Mr. Allan R. Shepherd, Mr. James D. France, and Mr. Xavier C. Nady appeared as attorneys for plaintiffs, and the defendants were represented by one or more of their attorneys of record.

Mr. McManus advised the Court that he had had an opportunity to review the proposed Memorandum of Decision and Order for Judgment, but that Mr. Nady had not had time to complete the reading of it, and that Mr. France had only read it hastily. Accordingly the Court recessed until twelve o'clock to give plaintiffs' counsel a further opportunity to examine the proposed Memorandum of Decision and Order for Judgment. (Tr. 87, Proceedings of January 25, 1956)

The Court inquired of Mr. McManus if he had now had an opportunity to review the proposed Memorandum of Decision and Order of Judgment. Mr. McManus replied that he had and the arguments, statements and remarks of the Court and counsel for plaintiffs are set out, to-wit:

"THE COURT: And you may make such record as you desire.

"MR. McMANUS: At the outset, in behalf of myself and my associates I want to express our appreciation for the courtesy Your Honor has extended to us in affording us the opportunity to go over this long Memorandum of Decision and Order for Judgment. We have all read it over, and at this time if Your Honor will permit me to, we would like to make into the record certain objections and exceptions to the form and content of it. Is that agreeable with the Court?

"THE COURT: I may before you proceed say that a very substantial part of it has to do with this chronology of events to which I referred. You may proceed.

"MR. McMANUS: I wonder if Your Honor would care to indicate how much time you think would be appropriate for us to use for this purpose? I am thinking of Your Honor's own schedule and program. I wonder if you would care to indicate how much time we may be afforded for that purpose?

"THE COURT: Well, I want to give you time to make your objections to it. Go ahead and make them.

"MR. McMANUS: Very well, Your Honor.

"The plaintiffs through their counsel now except and object to the proposed form and content of the Memoran-

dum of Decision and Order for Judgment which has been given to us by the defense counsel for each and all of the following reasons:

"First, we except and object to the form and content of said Memorandum of Decision and Order for Judgment for the reason that this case is not an appropriate proceeding for the filing of findings of fact and conclusions of law. Findings of fact and conclusions of law, under the rules of civil procedure, may be filed in certain non-jury cases where there is a hearing and trial and disposition of the issue and the subject matter of the action, but in our judgment they are inappropriate whereas in this situation the matters which were before the Court for decision on last Friday were purely legal questions raised by the reports of the Special Master of January 4th and January 17th, the two petitions for review, and the two objections and exceptions challenging the reports of the Special Master that I have mentioned, and the motions which were orally dictated into the record by defense counsel on that date, and the motion to vacate the order of reference, so that we feel that a final order disposing of this case should consist of what was before the Court for decision—the appearances, the rulings denying or sustaining or approving the petition for review, exceptions and objections, and the reports of the Special Master, an order giving effect to those rulings, and an order making disposition of the matter of costs, and that those are the matters that would be proper for a final order making disposition of this case, and that this case is not a case for the filing of findings of fact, and the findings of fact would not be binding on us, and the chronology that is set forth in the Memorandum of Decision can be found in the records and the proceedings of the Court.

"Now, in the first sentence of the Memorandum of Decision it is recited: 'The following matters were heard by the Court with consent of all parties and were submitted on January 20th, 1956.' Then in the very first paragraph it is stated 'The motion to dismiss filed October 10, 1955, was for submission.' Now we except and object to that statement for the reason that no order has ever been made setting down for submission before the Court the motion

to dismiss filed on October 10, 1955. It arose before this Court only on the report of the Special Master, our petitions for review, and our objections and exceptions thereto.

"In the order made by the Court on January 9th, I believe, 1956, Your Honor indicated that he was going to hear on January 20th the report of the Special Master with respect to the matters covered by his report and perhaps his order.

"As I understand this record, the Special Master sustained a motion to dismiss on December 22nd insofar as it related to the plaintiffs First Iowa Hydro Electric Cooperative and Harry J. Strong, and that is as far as that order went with respect to acting on that motion to dismiss which had been filed on Ocober 10th. So we do not regard the motion to dismiss as having come before the Court on Friday, January 20th, 1956, and that that motion was not before the Court except with respect to the failure to deposit money in the registry of the court, which was referred to the Court in the order made by the Special Master on January 16th, 1956. So that we take the view that the motion filed October 10th asking a dismissal as to all plaintiffs was not before the Court on Friday the 20th.

"Now, as we understand this record, the Special Master never undertook to dismiss the case as to all plaintiffs until he made his order of January 16th, 1956. That is our understanding of this record. So we do except to those statements contained in paragraphs one and three of the findings.

"Now, on page three, the last sentence in the first paragraph recites: 'In conformity with the rules the Court makes findings of fact,' and then these findings of fact commence which are numbered paragraphs 1 to 37, inclusive. And we except and object to the filing of those findings of fact, and contend they are in no way binding upon us, and that the Court had no power, authority or jurisdiction to make them under the rules of civil procedure, and that they are inappropriate in a proceedings of this kind inasmuch as there has been no hearing or trial and no occasion for the filing of findings of fact and conclusions of law with respect to these matters of record in the case.

"Now, if Your Honor please, at the bottom of page eight in paragraph two under the caption 'General,' where the Court has said 'The Court makes the following additional findings of fact,' in the last sentence in paragraph number two at the bottom of page eight the Court says: 'I find that plaintiffs have initially consented to the appointment of a Special Master.' It is true that we initially consented to the appointment of a Special Master in the person of Wayne G. Cook for the purpose of supervising the discovery deposition proceedings. We never at any time consented to the appointment of a Special Master with the broad general powers given by the order of September 21, 1955 appointing Edward A. Doerr as Special Master.

"THE COURT: Except perhaps as your admission may have been implied from your failure to take any exception to it by motion to vacate or otherwise until the motion was filed on Friday last.

"MR. McMANUS: I understand Your Honor's viewpoint in that connection.

"THE COURT: Yes. Very well.

"MR. McMANUS: In that connection I also say that on each and every occasion when we did appear before the Special Master the order appointing Edward Doerr as Special Master was challenged.

"THE COURT: Of course, Edward Doerr did not issue that order.

"MR. McMANUS: That is true. And all proceedings before the Special Master were by the record without prejudice to our challenge of the right of the Court, and the validity of the order, to appoint the Special Master. So that at all times and in every appearance before him we did raise that question, but we filed no motion to vacate the order of reference until the 19th day of January, 1956.

"Now, I don't raise any question but what we consented to the order appointing Mr. Cook in the first place with the supervisory powers that were given him by that order, but we never consented to the appointment of a Special Master with the broad powers given him by the order of September 21st, 1955, appointing Mr. Doerr.

"Now, many of the findings are replete with conclusions, and the matters are all record facts, and the records show exactly what did happen, and for that additional reason we take the view that it is not appropriate that the Court make any findings of fact and conclusions of law.

"Now, furthermore, the original order of the Special Master with respect to the motions to dismiss filed by the various defendants applied only to Harry Strong and the First Iowa Hydro Electric, and the second order made by him on the 16th of January, 1956, applied only to a dismissal of the cause with respect to F. A. E. Gillmor and the plaintiff First Iowa Hydro Electric Cooperative, so that until this order was made by Your Honor verbally into the record on the 20th day of January, 1956, no order had been made yet in this litigation with respect to the matter of dismissal as to all plaintiffs in the case, corporate and individual.

"We take the view that that matter was not before the Court on the 20th day of January, 1956, and we had no notice that the Court was going to take up the motion made by defendants on October 10th, 1955. So that we think that the Court was without jurisdiction to act on the motion made.

"THE COURT: The order entered when, you say?

"MR. McMANUS: The verbal order that Your Honor made on last Friday, the 20th, was the first order that had been made in the course of this litigation, as I understand the record, purporting to dismiss the case as to all plaintiffs, corporate, and individual, and personal. So that we feel that that order dismissing the case as to all plaintiffs should not have been entered, and shouldn't be entered in this Memorandum of Decision for the reasons given.

* * * *

"MR. McMANUS: Now as I read the last paragraph it contains this provision: 'Fees and disbursements of Edward A. Doerr shall be paid within ten days of entry of this judgment.' Now if Your Honor is going to enter this order at this time in this form it would seem to me that more than ten days should be afforded for the pur-

pose of raising the money to pay or for the purpose of applying for and obtaining an appropriate supersedeas or appeal bond in this case.

"THE COURT: So far as the time is concerned, I am willing to extend that time. I would extend that time to thirty days if you desire.

"MR. McMANUS: Well, I think it would be more appropriate if Your Honor would see fit to do that, and I want to make that suggestion without in any way waiving any of these questions that I have raised in the objections.

"THE COURT: Oh, I wouldn't consider that you would have waived any rights by making that request, and I will insert the word 'thirty' in here.

"MR. McMANUS: Mr. Nady has brought to my attention the fact that it was in Your Honor's order of September 21, 1955 appointing Doerr as Special Master that you ordered the deposit of $2,500 by the plaintiffs and defendants.

"THE COURT: That's right.

"MR. McMANUS: Which is no doubt true. So that we also challenge all of these proceedings upon the basis of the validity of that order. I am aware of the fact that under certain circumstances and conditions the Court would have the right to make such an order with respect to the deposit of the funds under appropriate circumstances. I don't challenge—

"THE COURT: With regard to what?

"MR. McMANUS: I say I do not challenge the right of the Court under certain conditions to make an order for the deposit of funds. I don't think the situation existed here which would warrant the Court in doing it, and we have raised all the way through the question with respect to the validity of Your Honor's order. Your Honor has his views that we should have done that by a motion earlier than we did, and I am content to rest on the record that has been made in that regard. I am obliged to as a matter of fact.

"That is all that I, myself, have to say with respect to the form and content of this order, except to say again that we think that all these findings of fact and conclusions of law have no proper place in a proceeding of this kind. There has been no hearing had, no trial, no issues submitted, and nothing but legal questions arising out of matters which were for submission on Friday last.

"Thank you, Your Honor." (Tr. 89-97, Proceedings of January 25, 1956)

"THE COURT: * * * * If I have erred in attempting to inform the reviewing court too fully, well, it will be the kind of error that I am perfectly willing to commit because I think they should have all of the information and background that they can. I find no reason to repeat what I attempted to say the other day that while my experience on the bench is not long, I have never encountered such contumacious conduct—I would say almost contumelious as has been disclosed in this matter, and I want the appellate court to have everything before it that it can that will disclose at least that the trial court has tried not to act with unseemly haste." (Tr. 98-99, Proceedings of January 25, 1956)

January 25, 1956

Filed memorandum of decision and order for judgment, Riley, J., and entered judgment. (R. 139, 154)

January 30, 1956

Filed Notice of Hearing and Supplemental Report of Special Master with Marshal's Return—"I hereby certify and return that the annexed Notice of Hearing and accompanying exhibit came into my hands on January 17, 1956, at Davenport, Iowa, and that on January 17, 1956 I served the same on the within named F. A. E. Gillmor by leaving a true copy thereof with Robert Gillmor at the usual place of residence of the said F. A. E. Gillmor located on Sec. 27, Allen's Grove Township,

Scott County, Iowa, the said Robert Gillmor being a person of proper age and discretion residing therein, Roland A. Walter, U. S. Marshal. By /s/ Don A. Davis, Deputy, Marshal's Fee $5.00."

February 16, 1956

Filed notice of appeal of First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, and Harry Imel from judgment entered on January 25, 1956, said notice being filed by J. Roger Wollenberg as attorney. (R. 155)

February 16, 1956

Filed mandate of U. S. Court of Appeals dismissing appeal from the order entered October 28, 1955, taken by F. A. E. Gillmor, Harry J. Strong and P. H. Naber, February 13, 1956. (Notice of entry mailed to all plaintiffs, their attorneys of record, attorneys of record for all defendants and Special Master.)

February 23, 1956

Filed notice of appeal of First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, Carl J. Mitzner, Harry Imel and James D. France, Xavier C. Nady, James R. McManus and Allan R. Shepherd from final judgment entered on January 25, 1956. (Said notice is set out below.)

NOTICE OF APPEAL

Notice is hereby given that First Iowa Hydro-Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, Carl J. Mitzner, Harry Imel, and P. H. Naber, Plaintiffs above named, and James D. France, Xavier C. Nady, James R. McManus and Allan R. Shepherd, and each of them, as attorneys of Record, for the above named Plaintiffs, and in their own behalf, hereby appeal to the United States Court of Appeals for the Eighth

Circuit from the final judgment entered in this action on the 25th day of January, 1956.

JAMES D. FRANCE,
XAVIER C. NADY,
ALLAN R. SHEPHERD,
JAMES R. McMANUS,

As Attorneys of record for Plaintiffs and in their own behalf as such attorneys of record.

JAMES D. FRANCE,
XAVIER C. NADY,
JAMES R. McMANUS,
ALLAN R. SHEPHERD,

417 Fleming Bldg.,
Des Moines, Iowa,
Attorneys for Plaintiffs-Appellants.

February 23, 1956

Filed receipt of Special Master, Edward A. Doerr, for $1,822.78 paid by Boyd, Walker, Huiskamp & Concannon covering ½ of his statement for services as per order of January 25, 1956.

March 19, 1956

Filed designation of record in this Cause, No. 15,548. (R. 157)

March 23, 1956

Filed deposition of Gillmor, Naber, Mitzner, Imel.